NO. 11872

IN THE

United States Court of Appeals
For the Ninth Circuit

CONSTANCIO R. ALESNA, et al.,

Appellants,

vs.

PHILIP L. RICE, as Judge of the Circuit Court for the Fifth Judicial Circuit of the Territory of Hawaii and WALTER D. ACKERMAN, JR., as Attorney General of the Territory of Hawaii,

Appellees.

Upon Appeal from the United States District Court for the District of Hawaii

---

Answering Brief of Appellees

WALTER D. ACKERMAN, JR.
Attorney General
Territory of Hawaii

MICHIRO WATANABE
Deputy Attorney General
Territory of Hawaii

Iolani Palace
Honolulu, T. H.

Attorneys for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

CASES

TEXTBOOKS AND PERIODICALS

STATUTES AND RULES

NO. 11872

IN THE

United States Court of Appeals

For the Ninth Circuit

CONSTANCIO R. ALESNA, et al.,

Appellants,

vs.

PHILIP L. RICE, as Judge of the Circuit Court for the Fifth Judicial Circuit of the Territory of Hawaii and WALTER D. ACKERMAN, JR., as Attorney General of the Territory of Hawaii,

Appellees.

Answering Brief of Appellees

JURISDICTION

This is an appeal from a final judgment and decree of the United States District Court for the District of Hawaii. (Rec. p. 344) Appellate jurisdiction to review the final decisions of said District Court is vested in this Court of Appeals. 28 U.S.C. sec. 225.[1]

This case was brought in the District Court for Ha-

[1]Section 128 of Judicial Code; 28 U.S.C. secs. 1291, 1294, effective September 1, 1948.

waii[1] under 28 U.S.C. sec. 41(14),[2] which confers jurisdiction on district courts of the United States of actions to redress the deprivation, under color of any law, custom or usage of any state, of any right secured by the Constitution, or by any law of the United States providing for equal rights of citizens, or of all persons within the jurisdiction, of the United States. (Rec. pp. 5-22) The action was brought to restrain further proceedings in a criminal contempt case pending in the Circuit Court of the Fifth Circuit, Territory of Hawaii. (Rec. p. 21) Appellees are the presiding judge and prosecutor, respectively, in said contempt proceeding. (Rec. p. 11) Said contempt proceeding was brought to punish violations of a temporary restraining order issued by appellee Circuit Judge to regulate picketing during a strike in the sugar industry in the Territory in 1946. (Rec. pp. 7-9) It was alleged in the complaint that plaintiffs were deprived by the issuance of such order of their right of peaceful picketing under the Norris-La Guardia Act[3] and section 20 of the Clayton Act[4] and under the Constitution of the United States, and were threatened with further deprivation of such right by the prosecution of said contempt charge. (Rec. pp. 6-20) Upon a hearing on the issues of law, a decision against the plaintiffs was rendered and a judgment

---

[1]The District Court for Hawaii has the jurisdiction of district courts of the United States. 48 U.S.C. sec. 642. In the revision of Title 28 of the U.S. Code, effective September 1, 1948, the District Court for Hawaii is to all intents and purposes a district court of the United States. 28 U.S.C. secs. 91, 132-135.

[2]Sec. 24(14) of Judicial Code; 28 U.S.C. sec. 1343(3), effective September 1, 1948.

[3]29 U.S.C. secs. 101-115; 47 Stat. 70-73.

[4]29 U.S.C. sec. 52, 38 Stat. 738.

entered dismissing the action. (Rec. pp. 314-340,[1] 343-344) The appeal is from said judgment. (Rec. p. 344)

STATEMENT OF THE CASE

The statement of the case on pages 4 to 14 of appellants' opening brief is supplemented and controverted in the following respects.

Appellees agree that the restraining order complained of in the instant case was issued *ex parte* and in a labor dispute. It is to be noted, however, that at the *ex parte* hearing, twenty-three affidavits were received in evidence (Rec. pp. 96-158, 163-164, 246-249) and the testimony of nine witnesses heard by the court (Rec. pp. 165-172, 251-299), on the basis of which the court found that the respondents in the equity suit had exceeded the bounds of peaceful picketing in that they had prevented the petitioner's manager and supervisory employees from entering petitioner's sugar factory, had prevented free access to its general merchandise store and in effect had taken possession and control of both factory and store, and also had been guilty of mass picketing and intimidation, and that the petitioner was threatened with irreparable damage by reason of the interruption of its vital operations. (Rec. pp. 173-174, 301-303) Moreover, at the hearing the question of the court's jurisdiction in the matter was raised by the court on its own motion, particularly with reference to the provisions of the Norris-La Guardia and National Labor Relations Acts, and the question argued by counsel for petitioner with citation of authorities. (Rec. pp. 161-163) The jurisdictional question was subsequently raised by counsel for respondents

---

[1]74 F. Supp. 865; s.c. 69 F. Supp. 897.

in an oral motion to vacate and dissolve the restraining order and thereupon extensively argued by counsel for the parties and *amicus curiae*. (Rec. pp. 189-193, 235-238) One other fact that may be mentioned in connection with the proceedings in the original suit in equity was the response by the respondents on a day set by the court to consider a possible modification of its order. Instead of the appearance of respondents' counsel, as was expected by the court, the following radiogram message was received:

"RADIOGRAM

"Ihufwad 140 Drush Honolulu 23
Honorable Judge Philip L. Rice
Judge of the Fifth Circuit Court
Court House Lihue

"Confirmation copy telephoned Sep. 23, 1946, to Nakamura by F.W. Time 146 P Date 9/23/46

"Re hearing today on possible modification restraining order Lihue Plantation Company case we have instructed our attorneys Richard Gladstein and Richard Mirikitani not to appear, although the court has set hearing for today we have not actually been ordered to appear inasmuch as we regard the court's ex parte restraining order as improperly issue in excess of jurisdiction and denying union members due process of law we see no purpose in being represented at a hearing to modify an order which in the first place we consider to be void and issued in clear defiance of our constitutional right to be heard in advance of being judged once again we ask you to vacate the restraining order.

"INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION,
JACK HALL,
Regional Director."

(Rec. p. 194)

As to the pending criminal contempt proceedings, it should be noted that the defendants therein (appellants in the instant case), while they were not named as individual respondents in the equity suit, were all members of the International Longshoremen's & Warehousemen's Union (hereinafter referred to as the ILWU), which was one of the respondents in the equity suit, and all were alleged to have had notice and knowledge of the order which they were charged of violating. Moreover, the alleged violations were (first count) for engaging in mass picketing with others, by assembling in compact groups and congregating in crowds on or near the plantation property, *to thereby prevent and attempt to prevent and physically obstruct and interfere with ingress to and egress from said property* and (second count) for picketing with others in groups of more than three pickets at *points of ingress to and egress from* said property, contrary to the provisions of the order.[1] (Rec. pp. 35, 39, 360, 363)

Appellants are, appellees believe, in error in stating on pages 7 to 8 of the opening brief that at the time their complaint in this case was filed, there was pending in this Court the appeal in *ILWU* v. *Wirtz*, No. 11568, decided September 27, 1948. The complaint in the instant case was filed January 31, 1947 (Rec. p. 2) but the petition for appeal in the other case was not filed in the Supreme Court of Hawaii until February 21, 1947. (*ILWU* v. *Wirtz*, Rec. p. 5) Counsel for appellants is also mistaken in the statement on page 8 of the opening brief as to the agreement with the then

[1]Compare statement of charge on page 7 of opening brief.

defendant attorney general,[1] according to whom the agreement was that in view of the pendency of the *Wirtz* case in the Supreme Court of Hawaii,[2] which was filed November 9, 1946 and decided December 4, 1946 and rehearing denied January 23, 1947, it would not be necessary to file a similar proceeding against appellee circuit judge and that he would not proceed with the criminal contempt case until the decision of the *Wirtz* case by the Supreme Court of Hawaii. The chronological order of the following events, denial of rehearing in the *Wirtz* case by the Supreme Court of Hawaii on January 23, 1947, filing of the complaint in the instant case on January 31, 1947, and the filing of the petition for appeal in the *Wirtz* case from the Supreme Court to this Court on February 21, 1947, definitely substantiates Mr. Tavares' version of the agreement.

Likewise, appellants' statement on page 12 of the opening brief that their motion to strike portions of the answers was filed within the time allowed by Rule 12(f) of the Federal Rules of Civil Procedure is not borne out by the record. The answers were served and filed July 21, 1947 (Rec. p. 304) and the motion was filed August 11, 1947, twenty-one days later. (Rec. p. 310) Rule 12(f) provides that motions to strike shall be filed within twenty days.

Appellees also dispute appellants' statement on page 13 of the opening brief that "the allegation of their complaint . . . included issues of denial of equal pro-

---

[1]C. Nils Tavares, Esq., was then attorney general. He was succeeded by Miss Rhoda V. Lewis, who in turn was succeeded by appellee Walter D. Ackerman, Jr. (Rec. pp. 340-341)

[2]37 Haw. 404, reh. den. 37 Haw. 445.

tection of the laws and of criminal proceedings not brought in good faith." In its decision the District Court refers to "plaintiffs' argument that a conspiracy to deny plaintiffs their rights and to single them out for prosecution in order to intimidate others has been alleged in the complaint." (Rec. p. 339) Appellees dispute the argument and categorically deny the base accusation.

SUMMARY OF ARGUMENT

The United States District Court for the District of Hawaii has jurisdiction under 28 U.S.C. sec. 41(14) [28 U.S.C. sec. 1343(3), effective September 1, 1948] of actions brought to redress the deprivation, under color of territorial law, of a right guaranteed by the Constitution, or a right secured by a Congressional act providing for equal rights. Contra: *Mo Hock Ke Lok Po* v. *Stainback*, 74 F. Supp. 852. Of the four counts[1] alleged in the complaint, the first and second counts do not fall within the jurisdictional section for the reason that they are based on statutes limiting the jurisdiction of courts, as distinguished from those creating substantive rights. The fourth count, being predicated on the constitutional guaranties of the First Amendment, comes within the provision. As to the third count, which is based on alleged substantive rights under the Norris-La Guardia and Clayton Acts, it is debatable, but there is some authority in support of the jurisdiction.

Although the District Court has jurisdiction of actions to redress the deprivation of civil rights under color of territorial law, such as is stated in the fourth count and possibly the third count in the instant case,

---

[1]The counts are summarized on page 18, post.

nevertheless the District Court was precluded from granting the relief sought in this case, which was to enjoin a criminal contempt proceeding pending in a circuit court of the Territory. The provisions of 28 U.S.C. sec. 379 (28 U.S.C. sec. 2283, effective September 1, 1948) prohibit the District Court from issuing any injunction staying a pending proceeding in any territorial court. While the limitation of said section is subject to judicial as well as statutory exceptions, the limitation is nevertheless jurisdictional and there is no exception for civil rights cases. The limitation is especially applicable as to pending criminal prosecutions. While the statute does not refer to the Territory, the statutes relating to the jurisdiction and procedure of the District Court and the cases establishing the relationship between the District Court and the territorial courts require that the limitation be given effect in the Territory. The action should therefore be dismissed.

Another reason for dismissal of the action is that the complaint fails to establish a cause of action for equitable relief. The case does not fall within the recognized exception that a threatened prosecution under an allegedly unconstitutional statute may be enjoined where there is danger of irreparable injury, both great and imminent. In the first place, the prosecution sought to be enjoined in this case is pending, not merely threatened. Furthermore, the incidental injury attendant upon a criminal prosecution, such as the plaintiffs in this case may suffer, is not such an irreparable injury as constitutes ground for equitable relief. The complaint is therefore wanting in equity.

A further jurisdictional objection is that no court of equity can enjoin another court or the judge of another

court, as distinguished from the parties litigant. Furthermore, the party litigant sought to be enjoined in this case is in substance the Territory, which cannot be sued without its consent. These fundamental objections preclude the exercise of jurisdiction in this case.

Moreover, the exercise of jurisdiction in this case is inconsistent with the principle that federal courts will leave matters of local concern or local law to the determination of the local courts. Whether the doctrine established in the alternative ground of decision in *United States* v. *United Mine Workers*, 330 U.S. 258, 67 S. Ct. 677, is the law of the Territory, is for the territorial courts to decide. If the doctrine should be adopted, as there is every reason to expect, there would be no basis for intervention by the federal court.

The several counts are without merit.[1] The first and second counts are controlled by the decision of this Court in *ILWU* v. *Wirtz*, decided September 27, 1948. The third count should likewise be rejected, for it is based on the argument that in enacting the Norris-La Guardia Act, Congress was legislating particularly for the Territory. The fourth count is governed by the doctrine of *Drivers Union* v. *Meadowmoor Co.*, 312 U.S. 287, 61 S. Ct. 552. The right to picket is a qualified, not an absolute, right. Where past picketing has been accompanied by violence, coercion or other unlawful conduct such as to give rise to a justifiable belief that future picketing is likely to result in a continuance of violence, coercion or other unlawful acts, a court of equity has the power to regulate picketing and even prohibit all picketing, consistently with the Constitution. Regulations designed to prevent obstruction of

---

[1]The counts are summarized on page 18, post.

points of ingress and egress, such as are involved in the instant case, are especially proper and generally sustained. Other objections to the order complained of by appellants, as well as the theory of substantive rights advanced by appellants in the third count, are answered in the brief of *amicus curiae*, which appellees herein adopt.

Furthermore, the merits of this cause are entirely immaterial in the light of the alternative ground of decision in the *United Mine Workers* case, which held that even if a court exceeded its jurisdiction in issuing an order, a violation of such order pending the determination of the court's jurisdiction constitutes criminal contempt, and *a fortiori*, regardless of the constitutionality of the order. Hence, even if the merits of all of the four counts should be sustained, which is, of course, denied, still there would be no basis for granting relief in the instant case.

The procedural objections raised by appellants are likewise without merit.

It is concluded that appellees' motions were properly granted and the judgment of the District Court should be affirmed.

ARGUMENT

I. Jurisdiction of District Court

A. Jurisdiction under 28 U.S.C. sec. 41(14)

This suit was brought under the provisions of section 41, subdivision 14, of Title 28 of the United States Code.[1] The cause of action is stated in four counts,

[1]Sec. 24(14) of Judicial Code; 28 U. S. C. sec. 1343(3), effective September 1, 1948.

each of which was alleged to have been brought under said section. (Rec. pp. 5-22) In order that the question of jurisdiction may be properly considered, a brief analysis of the provisions of the section will first be made and then the several counts will be examined in the light of the applicable rules.

Section 41(14) confers jurisdiction on the district courts of the United States in the following cases:

> "(14) *Suits to redress deprivation of civil rights.*
>
> "Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

1. REQUIREMENTS FOR JURISDICTION

In order that an action may be maintained under the section, the gist of the action must be for the deprivation, (1) under color of a law, statute, ordinance, regulation, custom, or usage of a *state*, (2) of either a right, privilege or immunity secured by the Constitution or a right secured by a federal law providing for equal rights of citizens of the United States or of all persons within the jurisdiction. For the purposes of this case, two questions are involved, first, whether the Territory is a *state* within the meaning of the section, and secondly, whether the counts involve a right secured by the Constitution or a right secured by a federal law providing for equal rights.

a. Deprivation under color of "state" law

The first question was considered by the Court and counsel in the proceedings in the District Court. Counsel for appellants argued and counsel for appellees agreed, and the Court held, that the Territory was included within the term *state* as used in said section. (Rec. p. 317; Op. Br. p. 2) Our position was based on an interpretation of the legislative history of the section.

The derivation of the section has been set forth in a number of cases, including *Hague* v. *CIO*, 307 U.S. 496, 59 S. Ct. 954, in which its history is traced in a note on page 508 of the official edition as follows:

> "The section is derived from R. S. 563, § 12, which, in turn, originated in § 3 of the Civil Rights Act of April 9, 1866, 14 Stat. 27, as re-enacted by § 18 of the Civil Rights Act of May 31, 1870, 16 Stat. 144, and referred to in § 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13."[1]

The jurisdictional section is to be compared with the substantive provision, section 43 of Title 8 of the United States Code, which was derived from Rev. Stat. sec. 1979, which in turn was derived from section 1 of the Civil Rights Act of April 20, 1871, 17 Stat. 13.[2] The section now reads:

> "§ 43. *Civil action for deprivation of rights.*
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be sub-

---

[1]The successive provisions referred to are set forth in the Appendix, pp. 73-75.

[2]The successive provisions referred to are set forth in the Appendix, pp. 75-76.

jected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The noteworthy change, for the purposes of this discussion, came in the Revised Statutes. In the substantive provision the revisers added the words *or Territory* after the word *state* but not in the jurisdictional section. Whatever may have been the reason for the amendment to the substantive section, the words inserted may not be disregarded but must be taken as part of the existing law. *U. S.* v. *Bowen*, 100 U. S. 508, 25 L. Ed. 631. The question is then whether the action of the revisers in expressly providing for rights of action for deprivation of civil rights under color of territorial authority should be set at naught for failure to provide a forum for the enforcement of such rights. Such a conclusion could be avoided either by construing the word *state*, as used in the jurisdictional section, to include the territories, as in *Andres* v. *United States*, 333 U. S. 740, 68 S. Ct. 880, wherein the word *state* as used in 18 U.S.C. sec. 542[1] was construed to include the Territory, or by determining that the jurisdictional section applies to the Territory by virtue of the provisions of the Hawaiian Organic Act which give the District Court the jurisdiction and procedure of a district court of the United States (48 U.S.C. secs. 642, 645).[2] Of course, Hawaii was not a territory when the Revised Statutes were enacted in 1873, but other territories existed and it is pertinent to determine what the revisers intended as to a forum for the enforcement of civil rights in the

[1]18 U.S.C. sec. 3566, effective September 1, 1948.
[2]The statutes are set out in the Appendix, pp. 76-77.

territories. In the Revised Statutes the jurisdiction of the district courts in the territories was defined to include the "same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the circuit and district courts of the United States . . ." Rev. Stat. sec. 1910. We argued that it was reasonable to suppose that the revisers did not insert the words *or Territory* in the jurisdictional section because Rev. Stat. sec. 1910 made it unnecessary to do so and that by like reasoning the provisions of the Hawaiian Organic Act make it unnecessary for the word *Territory* to appear in section 41(14) in order that the provision may apply to the Territory.

However, as pointed out in the Court's opinion (Rec. p. 317), the conclusion was contrary to the ruling of a three-judge court sitting as the United States District Court for Hawaii in *Mo Hock Ke Lok Po* v. *Stainback*, 74 F. Supp. 852 (appeal pending in U.S. Supreme Court), wherein it was held that section 41(14) did not apply to actions for deprivation of civil rights under color of territorial law and that the remedies for such violation lay in the courts of the Territory unless the jurisdictional amount of $3,000 is present.

There are a few other cases in which the meaning of the word *state* and the significance of the omission of the word *territory* in the statutes have been considered. In *Insular Police Commission* v. *Lopez*, 160 F. 2d 673 (C.A. 1st, 1947), *cert. den.* 331 U. S. 855, 67 S. Ct. 1743, the Court had under consideration a suit brought in the United States District Court for Puerto Rico under the Selective Training and Service Act of 1940, as amended, by which the plaintiff sought to obtain reinstatement in his former position as a police officer in the employ of the defendant police commission. The trial court held for the plaintiff but the appellate

court vacated the judgment and remanded the case with directions to dismiss the petition for lack of jurisdiction. The Court of Appeals held that the provision for restoration to employment in the United States government and its territories or possessions was unenforceable. As to the suggestion that jurisdiction of the action was sustained under 28 U.S.C. sec. 41(14), the Court pointed out that the provision would not apply in the case of a suit brought against an official of the United States since such an official could not be said to be acting "under color of any law . . . of any state", and indicated that a similar reasoning would apply in the case of a territorial official. The Court also pointed out that a right provided for by the Selective Service and Training Act could not be regarded as a "right secured by any law of the United States providing for equal rights of citizens of the United States". In another case, *Shimola* v. *Local Board No.* 42 *for Cuyahoga County*, 40 F. Supp. 808 (D.C.N.D. Ohio, 1941), it was likewise pointed out that section 41(14) does not cover an action brought against a local draft board because the action of such boards was under federal law and therefore could not be said to be under color of any law of any state.

In *Picking* v. *Pennsylvania R. Co.*, 151 F. 2d 240 (C.A. 3d, 1945) *cert. den.* 332 U. S. 776, 68 S. Ct. 38, a distinction between 8 U.S.C. sec. 43, the substantive section, and section 20 of the Criminal Code (18 U.S.C. sec. 52)[1] was pointed out on the ground that while the civil provision relates to deprivation under color of law "of any state or territory" the Criminal Code provision is not so limited. On the basis of such a difference, it

[1]The text is set out in the Appendix, pp. 77-78. Effective September 1, 1948, the section is 18 U.S.C. sec. 242.

was stated a federal officer is liable under the provisions of the Criminal Code but may not be sued under the civil substantive section "except under the laws of the United States in effect in a territory". 151 F. 2d 240, 251, n. 12. The basis for such an exception is not stated. It would seem that unless the officer could be said to have acted under color of territorial law, he would not be liable under the civil section. The question of what court would have jurisdiction to enforce the civil liability in such a case was also not considered.

Another substantive section, 8 U.S.C. sec. 42 (Rev. Stat. sec. 1978, derived from sec. 1 of the Civil Rights Act of April 9, 1866), providing that "all citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property" was under consideration by the Supreme Court in *Hurd* v. *Hodge*, 334 U. S. 24, 68 S. Ct. 847. As to whether the section applied to citizens residing in the District of Columbia, the Court stated:

> ". . . We have no doubt that, for the purposes of this section, the District of Columbia is included within the phrase 'every State and Territory.' "
> 334 U. S. 24, 31

Since the statute was relied upon by the defendants in defending the action to enforce restrictive covenants against them, the jurisdiction of the court was not dependent on civil rights.

On the basis of these cases, it is apparent that the substantive provisions on civil rights are broader than the jurisdictional provisions. Notwithstanding such adverse indications, we are maintaining our previous position that the provisions of section 41(14) apply

to deprivation of civil rights under color of territorial law.

b. The nature of the right deprived

The second requirement under consideration for a cause of action under section 41(14) is that the right deprived must be one secured by the Constitution or by a federal law providing for equal rights. Not all cases of alleged deprivation of constitutional rights come within the scope of the section. *Snowden* v. *Hughes*, 321 U. S. 1, 64 S. Ct. 397; *Williams* v. *Miller*, 48 F. Supp. 277 (D.C.N.D. Cal., 1942), *aff'd* 317 U. S. 599, 63 S. Ct. 258. It is clear, however, that actions to redress any deprivation of the guaranties of freedom of speech and of peaceful assembly are covered by the section. *Hague* v. *CIO*, 307 U. S. 496, 59 S. Ct. 954; *Douglas* v. *Jeannette*, 319 U. S. 157, 63 S. Ct. 877. Such cases are within the jurisdiction of district courts regardless of the amount in controversy. *Hague* v. *CIO*, *supra; Douglas* v. *Jeannette*, *supra; A.F. of L.* v. *Watson*, 327 U. S. 582, 590, 66 S. Ct. 761. Also, the deprivation of any right derived from any of the Civil Rights Acts would clearly come under the section, but as to rights under other federal statutes it is not at all clear. In the discussion of *Insular Police Commission* v. *Lopez*, *supra*, on page 15 of this brief, it was noted that the Selective Service Act was not regarded by the Court of Appeals as a law providing for equal rights of citizens. On the other hand, in *United Electrical, R. & M. Workers* v. *Baldwin*, 67 F. Supp. 235, 239 (D. C. Conn., 1946), the court ruled that "a conspiracy to discourage collective bargaining is a deprivation of the rights secured by the Wagner Act, and therefore also a basis of suit under the Civil Rights Act and Section 24(14) of the Judicial Code . . ." Since the Norris-

La Guardia and Clayton Acts are more like the Wagner Act than the Selective Service Act, the former case may not be in point and the latter may be regarded as a persuasive authority.

2. ANALYSIS OF COUNTS

It was noted at the beginning of this discussion that plaintiffs' complaint includes four counts, each of which is brought under 28 U.S.C. sec. 41(14).[1] The gist of each count may be stated as follows:

1. That the circuit courts of the Territory are *courts of the United States* within the meaning of the Norris-La Guardia Act and subject to its jurisdictional limitations; that the order complained of was issued in violation of such limitations and was therefore void.

2. That under the Norris-La Guardia Act, the United States District Court for Hawaii has exclusive jurisdiction to issue injunctions in labor disputes in the Territory; that any injunction issued by a circuit court of the Territory would accordingly be void.

3. That the Norris-La Guardia and Clayton Acts created certain substantive rights of labor; that the order in question violated such rights and was therefore void.

4. That the order in question contravened the rights of freedom of speech and peaceful assembly guaranteed by the Constitution.

It is to be noted that although each count refers to the Norris-La Guardia and Clayton Acts, it is only in the third count that the alleged substantive rights under

[1]The counts are summarized in the opening brief at pp. 8-9 and in an opinion of the District Court, Rec. pp. 58-59.

said Acts are relied upon as the cause of action. The first count is based on plaintiffs' contention that the Circuit Court of the Fifth Circuit, Territory of Hawaii, is a *court of the United States* within the meaning of the Norris-La Guardia Act and therefore without jurisdiction to issue injunctions in labor disputes except in compliance with the provisions of said Act; the second on the theory that under the Norris-La Guardia Act, the United States District Court for Hawaii has exclusive jurisdiction to issue injunctions in labor disputes in the Territory; the third on the theory of substantive rights; and the fourth count on the rights of freedom of speech and of peaceful assembly guaranteed by the First Amendment of the Constitution.

Appellees contend that the first and second counts do not come within the provisions of section 41(14). Said counts are not based on any substantive right claimed under the Norris-La Guardia or Clayton Acts but are based on provisions thereof limiting the jurisdiction of courts; otherwise they would merely duplicate the third count. On the other hand, appellees concede that the fourth count falls within the jurisdictional provision. The third count appears to be a debatable matter. As noted on page 18 of this brief, there is some indication that labor laws may be regarded as equal rights laws.

In short, appellees contend that the District Court for Hawaii has jurisdiction of actions to redress deprivation of civil rights under color of territorial law and that in the instant case the District Court had jurisdiction of the fourth count and possibly of the third, but not the first and second counts.

B. Limitation of 28 U.S.C. sec. 379

In opposition to the motion for a preliminary injunction, appellees contended that the District Court was without jurisdiction in equity to restrain proceedings pending in a circuit court of the Territory to enforce the criminal laws of the Territory. (Rec. p. 52) The contention was based on the provisions of section 379 of Title 28 of the United States Code,[1] which provided:

> "§ 379. (*Judicial Code, section* 265.) *Same; stay in State courts.*
>
> The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The Court, however, stated that the provision "is not jurisdictional, and has recognized exceptions," citing the case of *Toucey* v. *New York Life Insurance Co.*, 314 U. S. 118, 62 S. Ct. 139, and ruled against appellees. (Rec. p. 64) The Court also adhered to that ruling in its final decision. (Rec. p. 323) Appellees respectfully submit that the Court erred in its ruling and in its construction of the *Toucey* case and that the complaint should have been dismissed on the basis of this statute.

1. A JURISDICTIONAL LIMITATION

The Court was correct in stating that there are exceptions to the statute. The recognized exceptions are carefully enumerated in the opinion by Mr. Justice Frankfurter in the *Toucey* case, and were then limited

[1]Sec. 265 of Judicial Code; 28 U.S.C. sec. 2283, effective September 1, 1948.

to four statutory exceptions[1] and one judicial exception.[2] But it is not correct, it is respectfully submitted, that the Supreme Court in the *Toucey* case regarded the statute as not jurisdictional. Throughout its opinion the Court was considering a question of the *power* of the federal courts to stay proceedings in state courts. Thus, in the very first paragraph of the opinion, it is stated that the question before the Court was, "Does a federal court have power to stay a proceeding in a state court . . ." (p. 126); further on in the opinion there is a quotation referring to the statute as " 'a limitation of the power of federal courts dating almost from the beginning of our history and expressing an important Congressional policy—to prevent needless friction between state and federal courts' " (p. 129); and toward the end of the opinion it is stated that the statute " is not an isolated instance of withholding from the federal courts equity powers possessed by Anglo-American courts" and that "we must be scrupulous in our regard for the limits within which Congress has confined the authority of the courts of its own creation" (p. 141). The limitation of section 379 was, therefore, clearly regarded as jurisdictional by the Court.[3]

---

[1]A recent statutory exception is noted in *Bowles* v. *Willingham*, 321 U. S. 503, 510, 64 S. Ct. 641.

[2]The Reviser's note on 28 U.S.C. sec. 2283 points out that a second judicial exception was recognized prior to the *Toucey* case, which is now embodied in the statute. 1948 U.S. Code Congressional Service, p. 1910.

[3]However, in the dissenting opinion of Mr. Justice Reed it was stated that section 379 was "merely a limitation on general equity powers" as distinguished from the Norris-La Guardia Act, which is "a denial of jurisdiction to enjoin." 314 U.S. 118, 154, n. 24; 62 S. Ct. 139.

2. NO EXCEPTION FOR CASES UNDER CIVIL RIGHTS ACTS OR NORRIS-LA GUARDIA OR CLAYTON ACTS

The recognized statutory exceptions to section 379 do not include either the Civil Rights Acts or the Norris-La Guardia or Clayton Acts. Nor is there any recognized judicial exception for cases arising under said Acts. On the contrary, there are indications that the section applies equally in civil rights cases. In *Mickey* v. *Kansas City, Mo.*, 43 F. Supp. 739 (D.C.W. D. Mo., 1942), plaintiffs brought an action under 28 U.S.C. sec. 41(14) to redress an alleged deprivation of their right of freedom of religion and to restrain enforcement of certain ordinances alleged to be in violation of their constitutional rights, including the prosecution of pending criminal prosecutions. Quoting section 379, the District Judge ruled that the plaintiffs could not have an injunction interfering with the pending cases. It is to be noted that the case involved a right guaranteed by the First Amendment. For the purposes of determining the applicability of jurisdictional provisions, such as 28 U.S.C. sec. 41(14) and 28 U.S.C. sec. 379, there would seem to be no distinction between freedom of religion and freedom of speech or peaceful assembly. The case is therefore deemed directly in point. In another case, *Hemsley* v. *Myers*, 45 Fed. 283 (C.C. Kan., 1891), it was contended that the Civil Rights Act, specifically 8 U.S.C. sec. 43, in effect repealed or abrogated the provisions of section 379. In denying the contention, the Court said:

> ". . . The section [8 U.S.C. sec. 43] does not repeal, limit, or restrict the previously existing rules affecting the relations of the state and the United States courts, nor does it abolish the distinction between law and equity, or change the rules of pleading or mode of proceeding in any respect. . ."
>
> 45 Fed. 283, 290.

Although the case did not involve rights under the First Amendment, it did involve a constitutional right in that the plaintiffs were relying on the Interstate Commerce Clause in seeking to restrain further prosecution of a pending suit for injunction against the plaintiffs, as well as other threatened injunction suits and criminal and contempt proceedings in the state court. Similarly, a three-judge court sitting as the District Court for the Southern District of New York, in *Davega-City Radio, Inc.* v. *Boland*, 23 F. Supp. 969, held that section 379 prohibited the granting of an injunction sought by the plaintiff which would in effect enjoin enforcement of an order which was issued by the state court to enforce the provisions of the state labor relations law. The plaintiff had claimed that the proceedings under the state law were invalid for the reason that plaintiff was engaged in interstate commerce and therefore subject exclusively to the jurisdiction of the National Labor Relations Act. A case more in point is *United Electrical, R. & M. Workers* v. *Westinghouse El. Co.*, 65 F. Supp. 420 (D.C.E.D. Pa., 1946), where the union sued to restrain further proceedings in a suit brought by the company in a state court to enjoin a strike. The action was held not to be within any exception to section 379 and therefore subject to its limitation, notwithstanding the fact that the union had invoked its rights under the Norris-La Guardia and Wagner Acts. And, directly in point is *Carras* v. *Monaghan*, 65 F. Supp. 658 (D.C.W.D. Pa., 1946), where the statute was applied in an action brought by a union to enjoin the enforcement of an injunction issued in a labor dispute. The case is discussed more fully on page 57 of this brief. These cases show that the civil rights and labor laws do not constitute implied exceptions to the laws governing the jurisdiction and

procedure of the federal courts.

3. APPLICATION TO PENDING CRIMINAL PROSECUTIONS

The provisions of section 379 are especially applicable to cases in which it is sought to restrain further prosecution of a criminal proceeding pending in a state court. Thus, in *Harkrader* v. *Wadley*, 172 U. S. 148, 19 S. Ct. 119, the petitioner in a habeas corpus proceeding requested an injunction to restrain further prosecution of an embezzlement charge pending in a state court, contending that the indictment was obtained by the use of a deposition which he had made in a suit in a federal court, in violation of his constitutional rights. The Supreme Court, in reversing the action of the trial court granting the injunction, pointed out that even apart from the effect of section 379, "the general rule, both in England and in this country, is that courts of equity have no jurisdiction, unless expressly granted by statute, over the prosecution, the punishment or pardon of crimes and misdemeanors . . . and that to assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses . . . is to invade the domain of the courts of common law . . ." and, taking the statute into account, held that a federal court of equity "has no jurisdiction to stay by injunction proceedings pending in a state court in the name of the State to enforce the criminal laws of such State." 172 U.S. 148, 165, 170. Likewise, in *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U.S. 207, 23 S.Ct. 498, an action seeking to restrain further prosecution of a violation of an ordinance prohibiting the erection of gas tanks in certain parts of the city was dismissed on the ground that federal equity courts have no power to enjoin criminal pro-

ceedings pending in state courts. Again, in the leading case of *Ex parte Young*, 209 U. S. 123, 28 S. Ct. 441, wherein the Supreme Court established the exception that federal courts of equity have jurisdiction to enjoin *threatened* prosecutions for violations of an allegedly unconstitutional statute of a state, the Court recognized that "the Federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court," citing *Harkrader* v. *Wadley*, *supra.* 209 U.S. 123, 162.

The distinction between threatened and pending prosecutions was brought out sharply in *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 47 S. Ct. 681, which was an action brought before a three-judge federal court in Colorado to enjoin the enforcement of a state anti-trust law on the ground of its unconstitutionality. It was alleged that plaintiffs were threatened with further prosecution of a criminal charge then pending as well as of future criminal and civil prosecutions under the state law, and relief against all such prosecutions was sought. An injunction was granted by the trial court against all further prosecution, including the pending case. Upon direct appeal to the Supreme Court, it was held, on the authority of *Ex parte Young*, *supra*, that a pending prosecution in a state court could not be enjoined, and accordingly, the injunction was modified and reversed so far as it purported to enjoin further prosecution of the pending criminal case and allowed to stand only as to threatened prosecutions.

The distinction between threatened and pending prosecutions has been followed consistently by the federal courts (Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 Yale Law Journal 1169, 1191) and has been expressly recog-

nized in the Ninth Circuit, as is shown by the opinion of the Court in *Babcock* v. *Noh*, 99 F. 2d 738, 739-740 (C. A. 9th, 1938):

> "In support of the decree appellee argues broadly that a court of equity may enjoin a criminal prosecution under a void statute where such prosecution amounts to a wrongful invasion of a property right, citing Truax v. Raich, 239 U. S. 33, 36 S.Ct. 7, 60 L.Ed. 131, L.R.A.1916D, 545, Ann.Cas.1917B, 283; Packard v. Banton, 264 U.S. 140, 44 S.Ct. 257, 68 L.Ed. 596; Hygrade provision Co. v. Sherman, 266 U.S. 497, 45 S.Ct. 141, 69 L.Ed. 402; Terrace v. Thompson, 263 U.S. 197, 44 S. Ct. 15, 68 L. Ed. 255, and other similar cases. However, the present suit is not within the principle announced in these authorities. What was sought in those cases was relief against threatened, not pending, prosecutions; and in them the court proceeded upon the view that one is not compelled to test the constitutionality of an act by first incurring drastic penalties attached to its violation, but may, under extraordinary circumstances, appeal to equity for relief against the invasion of his property rights through the threatened enforcement of the statute. Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, 13 L.R.A.,N.S., 932, 14 Ann.Cas.764; Fenner v. Boykin, 271 U.S. 240, 46 S.Ct. 492, 70 L.Ed. 927; Terrace v. Thompson, supra. Here, no threat of the institution of other criminal proceedings under the act is alleged in the bill or found to have been made. The relief sought is against the further prosecution of the pending case. Compare Ritholz v. North Carolina State Board, D.C., 18 F. Supp. 409, 412.

The constitutional question said to be for determination by the Federal court is one which the state court is competent to deal with in the criminal action pending before it. Its decision of the

Federal question is subject to ultimate review in the Supreme Court of the United States. An adequate legal remedy is thus available. Fenner v. Boykin, supra. There is plainly no warrant for equitable interference with the proceedings in the state tribunal, even in the absence of the prohibition against such interference contained in § 265 of the Judicial Code, 28 U.S.C.A. § 379. Concerning the scope of this prohibition see Hill v. Martin, 296 U.S. 393, 403, 56 S.Ct. 278, 282, 80 L.Ed. 293; Essanay Film Mfg. Co. v. Kane, 258 U.S. 358, 361, 42 S.Ct. 318, 319, 66 L.Ed. 658."

4. APPLICABILITY TO THE TERRITORY

The foregoing discussion of 28 U.S.C. sec. 379 would not be pertinent, of course, unless the Territory is included in the term *state* as used in the section. In the proceedings in the District Court appellees contended, and the Court held, that the section applied to actions in the courts of the Territory. (Rec. p. 64) Appellees' position was, and still is, that the relation between the United States District Court for Hawaii and the territorial courts is the same as that between the courts of the United States and the state courts. Under the provisions of the Hawaiian Organic Act, particularly 48 U.S.C. sec. 642, which provides that the District Court for Hawaii "shall have the jurisdiction of district courts of the United States", and 48 U.S.C. sec. 645, which provides that "the laws of the United States relating to appeals, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii," it is reasonable to assume that the District Court for Hawaii is subject to the same jurisdictional limitations as to

matters pending in the territorial courts as the federal courts in the several states are with regard to pending cases in the state courts. Moreover, it has been noted that the jurisdiction of the District Court in this case depends upon a similar problem of statutory construction, that is, a construction of 28 U.S.C. sec. 41(14) to include territorial law by its reference to *state* law. In contending that the word *state* in both instances includes the Territory, appellees rely on the line of cases showing the relationship between the territorial and the federal courts.

In one of the first cases to reach this Court after the organization of the Territory, *Wilder's S. S. Co.* v. *Hind*, 108 Fed. 113 (C.A. 9th, 1901), *aff'd* 183 U.S. 545, 22 S. Ct. 225, this Court laid down the rule, although it was merely a dictum at the time, that the relation between the District Court for Hawaii and the territorial courts is the same as between the federal courts and the state courts in the various states.

> ". . . Upon consideration of the various provisions of the act providing a government for the territory of Hawaii, we are convinced that congress intended thereby to establish in that territory between the federal court created by the act and the system of territorial courts then existing, and substantially by the act perpetuated, the relation which exists between the courts of the United States and the state courts in the various states. It is not disputed that congress had the power to create in the territory of Hawaii such a system of courts, and to establish such a relation between them. The purpose to do so is manifest from various provisions of the act. . . ."
>
> 108 Fed. 113, 114-115

That rule was relied upon for the decision of this Court in *Yeung* v. *Territory of Hawaii*, 132 F. 2d 374 (C.A. 9th, 1942), which involved the question of whether the Territory was within the provisions for removal of criminal cases against federal officers from a state court to a federal court (28 U.S.C. sec. 76[1]), and the rule has obtained generally in the District Court for Hawaii. *In the Matter of Marshall*, 1 U.S.D.C. Haw. 34 (1900); *In the Matter of Atcherly*, 3 U.S.D.C. Haw. 404 (1909); *Soga* v. *Jarrett*, 3 U.S.D.C. Haw. 502 (1910); *In the Matter of Curran*, 4 U.S.D.C. Haw. 730 (1916). More recently, there is the case of *Mo Hock Ke Lok Po* v. *Stainback*, *supra*, wherein the majority of the three-judge court held that the Territory was included in the provisions for three-judge courts, 28 U.S.C. sec 380,[2] construing the word *state* as used in the statute to be applicable to the Territory. 74 F. Supp. 852, 858-861. Another instance of a construction of the word *state* to include the Territory is *Andres* v. *United States*, 333 U.S. 740, 68 S. Ct. 880, wherein 18 U.S.C. sec. 542, relating to the death penalty, was so construed.

The specific question of whether section 379 applies in the Territory[3] has been considered only by District Judge McLaughlin, who decided the instant case and also *Hall* v. *Hawaiian Pineapple Co.*, 72 F. Supp. 533 (D.C. Haw., 1947). In each case Judge McLaughlin deemed it applicable but, construing the

---

[1]28 U.S.C. sec. 1442, effective September 1, 1948.

[2]Judicial Code sec. 266; 28 U.S.C. secs. 2281, 2284, effective September 1, 1948.

[3]This problem of construction could arise only in a territory having separate systems of federal and territorial courts.

statute not to be jurisdictional and subject to exception in exceptional circumstances, proceeded nevertheless to a consideration of the merits of the cases. However, neither case is inconsistent with the rule as to the relationship of the courts. Appellees respectfully submit that the District Court was correct in deeming the statute applicable but in error in making an exception to its limitation.

C. Limitations on equity jurisdiction

The District Court, it has been noted, ruled in granting the preliminary injunction that although the provisions of 28 U.S.C. sec. 379 applied, the statute was not jurisdictional and was subject to exception in cases where there are "exceptional circumstances of peculiar urgency" (Rec. p. 64), and in its final decision in the case adhered to its previous ruling. (Rec. p. 323) Similarly, in *Hall* v. *Hawaiian Pineapple Co.*, *supra*, the Court held that "where there is basic equity jurisdiction, plus exceptional circumstances showing a danger of irreparable injury both great and immediate, a federal court may enjoin, despite the comity statute [28 U.S.C. sec. 379], even a criminal proceeding in a state court", citing *Douglas* v. *Jeannette*, 319 U.S. 157, 63 S. Ct. 877, and referring to the cases cited in its ruling in this case (Rec. pp. 64-65). 72 F. Supp. 533, 535. Appellees submit that the ruling of the District Court in this regard is contrary to the authorities, *Toucey* v. *New York Life Insurance Co.*, *supra*, and *Bowles* v. *Willingham*, *supra*, discussed on pages 20 to 21 of this brief, and a misapplication of the exception stated in the case of *Douglas* v. *Jeannette*, *supra*, to the general rule that equity will not restrain criminal prosecutions. As shown on pages 20 to 21 of this brief, there are but few recognized exceptions to section 379 and

the exception made by the District Court in this and the *Hall* case is not one of them. The exception to the general rule that equity will not restrain criminal prosecutions is, it will be shown, applicable only to threatened prosecutions under allegedly unconstitutional statutes, and not to pending prosecutions.

1. THE RULE OF DOUGLAS V. JEANNETTE

Douglas v. *Jeannette*, *supra*, was a case brought under the Civil Rights Acts in a United States District Court for Western Pennsylvania to restrain threatened criminal prosecutions in the state courts to enforce an allegedly unconstitutional ordinance prohibiting solicitation of orders for merchandise without first procuring a license and paying a license tax. Plaintiffs, who were Jehovah's Witnesses, claimed the ordinance abridged the guaranties of freedom of speech, press and religion of the First Amendment, which are made applicable to the states by the Fourteenth Amendment. Plaintiffs alleged that they had been previously prosecuted and that they were threatened with further prosecution under the ordinance. The trial court, after trial, issued a permanent injunction enjoining enforcement of the ordinance, but on appeal the Court of Appeals for the Third Circuit reversed the judgment on the merits. Upon appeal to the Supreme Court, the Court likewise held that the complaint failed to establish a cause of action in equity and affirmed the judgment of the Court of Appeals. Concurrently, the Court ruled in a companion case, *Murdock* v. *Pennsylvania*, 319 U.S. 105, 63 S. Ct. 870, that the ordinance was unconstitutional. That the case concerned *threatened* criminal prosecutions, as distinguished from pending prosecutions, is shown by the following references (emphasis has been added):

"Petitioners brought this suit in the United States District Court for Western Pennsylvania to restrain *threatened criminal prosecution* of them in the state courts by respondents, the City of Jeannette (a Pennsylvania municipal corporation) and its Mayor, for violation of a city ordinance which prohibits the solicitation of orders for merchandise without first procuring a license from the city authorities and paying a license tax. . . .

". . . It is alleged that in April, 1939, respondents arrested and prosecuted petitioners and other Jehovah's Witnesses for violation of the ordinance because of their described activities in distributing religious literature, without the permits required by the ordinance, and that *respondents threaten to continue to enforce the ordinance* by arrests and prosecutions—all in violation of petitioners' civil rights.

". . . In substance, the complaint alleges that respondents, proceeding under the challenged ordinance, by arrest, detention and by criminal prosecutions of petitioners and other Jehovah's Witnesses, had subjected them to deprivation of their rights of freedom of speech, press and religion secured by the Constitution, and *the complaint seek equitable relief from such deprivation in the future.*

"Notwithstanding the authority of the district court, as a federal court, to hear and dispose of the case, petitioners are entitled to the relief prayed only if they establish a cause of action in equity. Want of equity jurisdiction, while not going to the power of the court to decide the cause, *Di Giovanni* v. *Camden Ins. Assn.*, 296 U.S. 64, 69; *Pennsylvania* v. *Williams*, 294 U.S. 176, 181-82, may nevertheless, in the discretion of the court, be objected to on its own motion. *Twist* v. *Prairie Oil Co.*, 274 U.S. 684, 690; *Pennsylvania* v.

Williams, supra, 185. Especially should it do so where its powers are invoked to interfere by injunction with *threatened criminal prosecutions* in a state court.

". . . Congress, by its legislation, has adopted the policy, with certain well defined statutory exceptions, of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity in the exercise of their discretionary powers should conform to this policy by refusing to interfere with or embarrass *threatened proceedings* in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent; and equitable remedies infringing this independence of the states—though they might otherwise be given—should be withheld if sought on slight or inconsequential grounds. *Di Giovanni* v. *Camden Ins. Assn., supra*, 73; *Matthews* v. *Rodgers*, 284 U.S. 521, 525-26; cf. *United States ex rel. Kennedy* v. *Tyler*, 269 U.S. 13; *Massachusetts State Grange* v. *Benton*, 272 U.S. 525.

". . . Where the *threatened prosecution* is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning and application, subject only to review by this Court on federal grounds appropriately asserted. Hence the arrest by the federal courts of the processes of the criminal law within the states, and the determination of questions of criminal liability under state law by a federal court of equity, are to be supported only on a showing of danger of irreparable injury 'both great and immediate.' *Spielman Motor Co.* v. *Dodge*, 295 U.S. 89, 95, and cases cited; *Beal* v. *Missouri Pacific R. Corp.*, 312 U.S. 45, 49, and cases cited; *Watson* v. *Buck*, 313 U.S. 387; *Williams* v. *Miller*, 317 U.S. 599.

> "The trial court found that respondents had prosecuted certain of petitioners and other Jehovah's Witnesses for distributing the literature described in the complaint without having obtained the license required by the ordinance, and had declared their intention further to enforce the ordinance against petitioners and other Jehovah's Witnesses. But the court made no finding of *threatened irreparable injury* to petitioners or others, and we cannot say that the declared intention to institute other prosecutions is sufficient to establish irreparable injury in the circumstances of this case.
>
> "Nor is it enough to justify the exercise of the equity jurisdiction in the circumstances of this case that there are numerous members of a class *threatened with prosecution* for violation of the ordinance. . . ."
>
> 319 U.S. 157, 159-165

As is to be expected, there is no mention of 28 U.S.C. sec. 379, for relief was not sought against any proceeding pending in a state court.

Furthermore, an examination of the cases referred to by the District Court in its rulings in this case as well as in the *Hall* case has failed to reveal a single case where an injunction issued by a federal court against a criminal prosecution pending in a state court has been sustained. And in view of the cases discussed on pages 24 to 27 of this brief, any such decision would hardly be persuasive. One of the cases examined, *Truax* v. *Raich*, 239 U.S. 33, 36 S. Ct. 7, seemed to be at variance with the rule, for a preliminary injunction against a pending prosecution in a state court was sustained. Nevertheless, the case is in line with the other cases, as an examination of the facts will show. The explanation for the apparent departure

lies in the fact that the prosecution was commenced after the filing of the equity suit, which was brought to restrain threatened prosecutions. 239 U.S. 33, 36. In the opinion of the three-judge court which granted a preliminary injunction, *Raich v. Truax*, 219 Fed. 273, 284 (D.C. Ariz., 1915), the reason is given as follows:

> "In the case at bar the court acquired jurisdiction before any criminal proceedings were instituted against the defendant Truax, and should under the rule in Ex parte Young, supra, maintain its jurisdiction to the exclusion of all criminal proceedings instituted against Truax in the state courts."

The case resembles *Looney* v. *Eastern Texas R. R.*, 247 U. S. 214, 38 S. Ct. 460, where a state court proceeding was also enjoined. There the state court proceeding was instituted not only after the federal suit was filed but in the face of a temporary injunction previously issued by the federal court against such a suit. The case is discussed and explained in the Court's opinion in the *Toucey* case, 314 U. S. 118, 138, as an instance of a federal court protecting its jurisdiction until determination of the original suit brought before it. Such cases are obviously distinguishable from the instant case and the other cases where the prohibition of section 379 has applied.

2. REQUIREMENTS FOR INJUNCTION AGAINST THREATENED PROCEEDINGS

The quotations from *Douglas* v. *Jeannette*, *supra*, in the preceding section of this brief show that federal courts have jurisdiction in equity to enjoin threatened criminal prosecutions in the state courts under allegedly unconstitutional statutes only in those cases where it is necessary "to prevent irreparable injury which is

clear and imminent" (319 U. S. 157, 163), or, as stated elsewhere in the opinion, "only on a showing of danger of irreparable injury 'both great and imminent' " (p. 164). In *Watson* v. *Buck*, 313 U. S. 387, 61 S. Ct. 962, plaintiffs were denied relief in an action brought to restrain enforcement of a Florida statute forbidding combinations of musical composers, publishers and owners of copyrighted compositions on the ground that there was no showing of a threat of enforcement. The Court said (313 U. S. 387, 400):

> ". . . The imminence and immediacy of proposed enforcement, the nature of the threats actually made, and the exceptional and irreparable injury which complainants would sustain if those threats were carried out are among the vital allegations which must be shown to exist before restraint of criminal proceedings is justified. . . ."

Again in *Beal* v. *Missouri·P. R. Corp.*, 312 U. S. 45, 61 S. Ct. 418, an action brought to enjoin enforcement of a Nebraska "full train crew" statute was dismissed for want of equity jurisdiction even though there were allegations of a multiplicity of threatened prosecutions and a liability for large fines as a consequence of such prosecutions. The Court pointed out that there was no showing that more than one prosecution was threatened or that the penalties would be so large as to prevent recourse to the courts for adjudication of plaintiff's rights under the statute. In *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 55 S. Ct. 678, an action to enjoin threatened prosecution under a New York statute regulating motor vehicle dealers was dismissed for want of equity jurisdiction on the ground that the plaintiffs failed to show " 'danger of irreparable loss . . . both great and immediate'." 295 U.S. 89, 95. The Court pointed out further that the plaintiffs should set up

their defense in the state courts, with ultimate review in the United States Supreme Court. In *Fenner* v. *Boykin*, 271 U. S. 240, 46 S. Ct. 492, a suit to enjoin threatened enforcement of a Georgia statute prohibiting dealings in cotton futures was dismissed for similar reasons. The rule likewise applies to threatened civil suits, as is shown in *Cavanaugh* v. *Looney*, 248 U. S. 453, 39 S. Ct. 142, where a suit to enjoin the institution of condemnation proceedings authorized by a Texas statute was held to lack grounds for equitable jurisdiction for similar reasons. In each of these cases a suit for injunction brought in the federal court against threatened proceedings in a state court was dismissed for lack of equity. The basis for the rule lies in the fact that the state courts are as bound by the Constitution of the United States as are the federal courts and that all defenses against an unconstitutional statute are available to and may be presented by the party in the state court.

These cases further hold that the incidental injury attendant upon a criminal prosecution is not such an irreparable injury as constitutes ground for equitable intervention, for no one is free from prosecution in good faith. The District Court, however, ruled that the rule should not apply in a case brought under the First Amendment. Yet it was in *Douglas* v. *Jeannette*, *supra*, a leading civil rights case, in which the rule was but recently restated:

> "It is a familar rule that courts of equity do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guaranties, is not a ground for equity relief since the lawfulness or constitutionality of the statute

> or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction. *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207; *Fenner* v. *Boykin*, 271 U. S. 240. . . ."
>
> 319 U. S. 157, 163

Other civil rights cases in point are *Bevins* v. *Prindable*, 39 F. Supp. 708 (D.C.E.D. Ill., 1941), *aff'd* 314 U. S. 573, 62 S. Ct. 112; *Keegan* v. *New Jersey*, 42 F. Supp. 922 (D.C.N.J. 1941); *United Electrical R. & M. Workers* v. *Baldwin*, 67 F. Supp. 235 (D.C. Conn., 1946); *Atlantic Fishermen's Union* v. *Barnes*, 71 F. Supp. 927 (D.C. Mass., 1947). Underlying the reluctance on the part of federal courts to take jurisdiction of matters in the state courts is the realization, expressed in *Fenner* v. *Boykin*, 271 U. S. 240, 244, 46 S. Ct. 492, that "an intolerable condition would arise if, whenever about to be charged with violating a state law, one were permitted freely to contest its validity by an original proceeding in some federal court."

Here there has been but one prosecution, and that pending at the time the instant case was filed, and never any threat of other prosecutions. Under the foregoing authorities, there was no basis, it is respectfully submitted, for equitable intervention in this case.

D. Jurisdiction against Judges and Public Officers

Another jurisdictional objection in this case lies in the fact that this action was brought against the judge of a circuit court, a court of general jurisdiction, of the Territory of Hawaii and against the attorney general of the Territory, its chief law enforcement officer, in their respective official capacities. The objection is based on fundamental principles which cannot be disregarded without far-reaching consequences to the administration of justice in the Territory.

1. NO JURISDICTION AGAINST COURTS AND JUDGES

In appellees' objections to the allowance of a preliminary injunction, their first pleading in this case, it was contended that the District Court was without jurisdiction to issue an injunction against the judge of a circuit court of the Territory. (Rec. p. 52) The contention was repeated in their answer (Rec. p. 79) and is maintained in this appeal.

This objection goes back to the historical origins of equity, to which it is traced in Maitland on Equity (2d ed. rev. 1936), at page 9:

> ". . . it [Court of chancery] never presumed to send to them [courts of law] such mandates as the Court of King's Bench habitually sent to the inferior courts, telling them that they must do this or must not do that or quashing their proceedings—the Chancellor's injunction was in theory a very different thing from a mandamus, a prohibition, a certiorari, or the like. It was addressed not to the judges, but to the party. . . ."

And it applies in the relations between federal courts and state courts, as said in Taylor and Willis, *The Power of Federal Courts to Enjoin Proceedings in State Courts*, 42 Yale Law Journal 1169, 1185:

> ". . . Moreover, considered purely as a matter of general chancery practice, apart from any considerations peculiar to the relation between states and federal courts, it has long been settled that an injunction against court proceedings should always issue against the plaintiff, never against the judge before whom the cause is being tried. Even during the reign of James the First, when the conflict between law and equity was most bitter, the chancellors did not presume to exercise the injunctive power against the judges themselves."

That this historical limitation is part of the law of equity in this country is shown by the opinion of the Court in *Ex parte Young*, 209 U. S. 123, 163, 28 S. Ct. 441:

> "It is proper to add that the right to enjoin an individual, even though a state official, from commencing suits under circumstances already stated, does not include the power to restrain a court from acting in any case brought before it, either of a civil or criminal nature, nor does it include power to prevent any investigation or action by a grand jury. The latter body is part of the machinery of a criminal court, and an injunction against a state court would be a violation of the whole scheme of our Government. If an injunction against an individual is disobeyed, and he commences proceedings before a grand jury or in a court, such disobedience is personal only, and the court or jury can proceed without incurring any penalty on that account.
>
> "The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction is plain, and no power to do the latter exists because of a power to do the former."

The rule is one of general acceptance, as is indicated by the foregoing and other authorities, such as *Arrowsmith* v. *Gleason*, 129 U. S. 86, 98, 9 S. Ct. 237; 1 High on Injunctions (4th Ed.) pp. 62-63; 4 Pomeroy's Equity Jurisprudence (5th Ed.) p. 974; 28 Am. Jur. 381-382. But being of such a fundamental and elementary nature, it seldom enters into the decision of a case.

While it is true that in the instant case the District Court did not at any time restrain the appellee Circuit Judge, it is submitted the Court was in error in assum-

ing and retaining jurisdiction over the appellee Circuit Judge in this, a suit for an injunction. In support of its ruling, the Court cited the case of *Picking* v. *Pennsylvania R. Co.*, 151 F. 2d 240, 250 (C.A. 3d, 1945). (Rec. p. 323) The question involved in that case, so far as it is pertinent on this point, was whether a justice of peace who was alleged to have denied and refused a hearing to plaintiffs upon their arrest and to have conspired with other defendants to deprive plaintiffs of their liberty without due process of law, could be held answerable in damages under the Civil Rights Acts. The Court held that the common law privilege of judicial officers was abrogated by the Acts and that therefore it was error to dismiss the complaint as to the justice of peace. Be that as it may, there is no resemblance between the facts of that case and the instant case. The action complained of in the instant case, purportedly "fully described" in the complaint (Rec. pp. 6, 15), was the issuance of a temporary restraining order regulating picketing during a strike and the bringing of plaintiffs to trial on a criminal contempt charge for a violation of the order. There is no allegation of a conspiracy by the appellees, or an abuse of office or other malicious action on the part of the appellees, and indeed there could be none.[1] A case more like the instant case is the situation covered by the alternative ground of decision in *United States* v. *United Mine Workers*, 330 U. S. 258, 67 S. Ct. 677, where the Supreme Court held that assuming the District Court acted in excess of its jurisdiction in issuing the temporary restraining order enjoining the miners' strike, nevertheless a violation of such order pending

[1]But compare the statement on page 13 of the opening brief, previously discussed on page 6 of this brief.

the determination of the question of the Court's jurisdiction constituted criminal contempt.[1] An especially significant feature of the case is that Mr. Justice Frankfurter, who disagreed with the majority of the Court on the question of the District Court's jurisdiction under the Norris-La Guardia Act, joined in condemning the defendants for violating the order. If appellees in the instant case are subject to liability under the Civil Rights Acts, it would seem that in the situation of the alternative ground of decision in that case, United States District Judge Goldsborough and the Attorney General of the United States would likewise have been liable, if not civilly under 8 U.S.C. sec. 43, which is limited to action under color of state or territorial law, at least criminally under 18 U.S.C. sec. 52.[2] *Picking* v. *Pennsylvania R. Co.*, *supra*, 151 F. 2d 240, 251, n. 12. It would seem unlikely, to say the least, that any court would hold those violating such an order guilty of criminal contempt, on the one hand, and the judge issuing the order liable in damages and even guilty of a crime, on the other.

2. LIMITATION ON JURISDICTION AGAINST PUBLC OFFICERS

It is axiomatic that the state cannot be sued without its consent, and it is well established that the sovereign immunity may not be evaded by bringing a suit against a representative of the state where the state is the real party against which relief is sought, although not a part of record. 49 Am. Jur. 301-305. It is true, an officer of a state may be sued under certain circumstances. In *Ex parte Young*, 209 U. S. 123, 28 S. Ct. 441, it was held that the attorney general of a state

[1]A fuller statement of the case is given on pages 63 to 64 of this brief.

[2]18 U.S.C. sec. 242, effective September 1, 1948.

may be sued for injunctive relief if the statute under which he proposes to act is unconstitutional. The principle underlying this rule is that the officer cannot use the name of the state where there is no constitutional statute upon which to base his action,[1] On the same line of reasoning, if the proposed action complained of is the prosecution of a criminal contempt proceeding, the question would be whether there is an order such as would sustain such proceeding. If not, he should be subject to restraint as he would be in case he were acting under an unconstitutional statute. However, if there is such an order, it should follow that he would be acting as the representative of the state and therefore not subject to restraint.

The Territory comes within the rule of sovereign immunity. *Kawananakoa* v. *Polyblank*, 205 U. S. 349, 27 S. Ct. 526. The foregoing rules, accordingly, apply to the Territory. In the instant case, plaintiffs have sought to enjoin appellee Attorney General from prosecuting a criminal contempt case. Suit has been brought against the officer in his official capacity and the Territory has not been named a party herein. But the proceeding which the plaintiffs seek to enjoin is in effect an action brought by the Territory against

---

[1]The distinction is illustrated in *Ex parte La Prade*, 289 U.S. 444, 53 S. Ct. 682, where a suit brought against the attorney general of Arizona to restrain threatened enforcement of a statute was dismissed as against his successor because it was not shown that the successor personally threatened enforcement. Compare the situation in the instant case where there have been two changes in office, as noted on page 6 of this brief.

the plaintiffs herein.[1] (Rec. pp. 32-40, 357-364) Hence, the substance of the relief sought is restraint of the Territory. Under the rule of sovereign immunity, relief cannot be had in such a case.

It is alleged by the appellents that appellee is acting under an invalid order and it would be argued, of course, that therefore he is stripped of his office and may be sued as an individual. But the *United Mine Workers* case, discussed in the preceding section of this brief, shows that even an order issued in the excess of jurisdiction is valid and enforceable pending the determination of the question of the court's jurisdiction, and that the violation of such an order constitutes criminal contempt notwithstanding that it may be later determined to have been issued in excess of jurisdiction. *A fortiori*, an order subject merely to constitutional infirmity, as distinguished from a jurisdictional defect, would sustain contempt proceedings. In *Howat* v. *Kansas*, 258 U. S. 181, 42 S. Ct. 277, long before the *United Mine Workers* case, it was established that an order issued by a court having jurisdiction must be obeyed regardless of the constitutionality of the statute upon which the order is based.[2] The following passage from the *United Mine Workers* case (330 U. S. 258, 293-294) shows the relationship of the two rules:

> "Proceeding further, we find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is

[1]The nature of criminal contempt proceedings is discussed in the answering brief of appellee Wirtz in *ILWU* v. *Wirtz*, *supra*.

[2]The case is more fully discussed on pages 64 to 65 of this brief.

reversed by orderly and proper proceedings. This is true without regard even for the constitutionality of the Act under which the order is issued. In *Howat* v. *Kansas*, 258 U. S. 181, 189-90 (1922) this Court said:

> "'An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its l a w f u l authority, t o b e punished.'"

Violations of an order are punishable as criminal contempt even though the order is set aside on appeal, *Worden* v. *Searls*, 121 U. S. 14 (1887), or though the basic action has become moot, *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418 (1911).

"We insist upon the same duty of obedience where, as here, the subject matter of the suit, as well as the parties, was properly before the court; where the elements of federal jurisdiction were clearly shown; and where the authority of the court of first instance to issue an order ancillary to the main suit depended upon a statute, the scope and applicability of which were subject to substantial doubt. The District Court on November 29 affirmatively decided that the Norris-LaGuardia Act was of no force in this case and that injunctive relief was therefore authorized. Orders outstanding or issued after that date were to be

> obeyed until they expired or were set aside by appropriate proceedings, appellate or otherwise. Convictions for criminal contempt intervening before that time may stand."

Inasmuch as the order upon which the pending criminal contempt case is based is a valid order for the purposes of the contempt case, appellee Attorney General is acting in his official capacity and is not subject to and may not be enjoined.

It is respectively submitted that the retention of jurisdiction over the appellees in the instant case was inconsistent with the fundamental principles herein discussed.

E. Abstention in matters of local concern

A salutary principle governing the exercise of jurisdiction by federal courts is that the federal courts will leave the determination of matters of local law or local concern to the local courts and will follow the decisions of the local courts in such matters. The controlling rule is that "in so far as the decisions of the Supreme Court of Hawaii are in conformity with the Constitution and applicable statutes of the United States and are not manifestly erroneous in their statement or application of governing principles, they are to be accepted as stating the law of the Territory." *Waialua Co.* v. *Christian*, 305 U.S. 91, 109, 59 S. Ct. 21. See also *United States* v. *Fullard-Leo*, 331 U. S. 256, 269, 67 S. Ct. 1287; *Lewers & Cooke* v. *Atcherly*, 222 U. S. 285, 294, 32 S. Ct. 94; *Kealoha* v. *Castle*, 210 U. S. 149, 154, 28 S. Ct. 684; *Ewa Plantation Co.* v. *Wilder*, 289 Fed. 664, 669 (C.A. 9th, 1923). Applying the principle in the instant case, the District Court declined in its final decision to determine whether the alternative ground of decision in the *United Mine Workers* case applied

in the Territory.[1] (Rec. p. 340) But, if the matter is one for the territorial courts to decide, it would seem to follow that there was no occasion for the District Court to consider the question of whether the order challenged in the instant case was within the jurisdiction of the court issuing it or whether it was in contravention of any federal statute or the Constitution. If the territorial courts should choose to follow the rules of the *United Mine Workers* case and *Howat* v. *Kansas*, discussed in the preceding section of this brief (pages 41, 44), the plaintiffs in the instant case would be liable for criminal contempt regardless of such questions. The point is, if it is for the territorial courts to decide to follow such precedents, and there is every reason to expect them to do so, there is no basis for intervention by a federal court and accordingly the pending contempt proceedings in question in the instant case should be permitted to proceed without interference.

II. Merits of the Cause

Appellees have argued at length that applicable statutory and judicial limitations precluded the exercise of jurisdiction by the District Court in the instant case. Of course, for the purpose of determining whether the complaint stated a cause of action upon which the court could grant relief, the Court rightly assumed jurisdiction. *Westminster School Dist. of Orange County* v. *Mendez*, 161 F. 2d 774, 778 (C.A. 9th, 1947). But, appellees contend, upon assuming juris-

[1]Contrary to the indication in the District Court's opinion (Rec. p. 340), it was contended in the answering brief of appellee Wirtz (pp. 8-10) in *ILWU* v. *Wirtz*, *supra*, that the local decisions were not in conflict with the rule of the *United Mine Workers* case.

diction to determine its power to grant relief, the Court should have denied relief on the basis of such jurisdictional limitations. Over appellees' objections, the Court nevertheless proceeded to a consideration of the merits of the four counts alleged in the complaint. Inasmuch as the appeal is taken primarily from the rulings on the merits, appellees deem it necessary to submit a brief statement in support of the Court's rulings. Assuming, then, for the purposes of argument that the merits of the counts were in issue, which appellees deny, appellees submit that the rulings were correct.

The gist of the several counts has been previously stated (page 18 of this brief) as follows:

> 1 That the circuit courts of the Territory are *courts of the United States* within the meaning of the Norris-La Guardia Act and subject to its jurisdictional limitations; that the order complained of was issued in violation of such limitations and was therefore void.
>
> 2 That under the Norris-La Guardia Act, the United States District Court for Hawaii has exclusive jurisdiction to issue injunctions in labor disputes in the Territory; that any injunction issued by a circuit court of the Territory would accordingly be void.
>
> 3 That the Norris-La Guardia and Clayton Acts created certain substantive rights of labor; that the order in question violated such rights and was therefore void.
>
> 4 That the order in question contravened the rights of freedom of speech and peaceful assembly guaranteed by the Constitution.

The first count is the same as the issue in *ILWU* v. *Wirtz*, which was decided by this Court on September 27, 1948, and is controlled by that decision. The sec-

ond count is also controlled by the decision in *ILWU* v. *Wirtz*. It may be added that appellants cite no authority in support of their theory and that the same theory has been rejected in the three cases in which it has been considered to our knowledge, to wit, in the instant case (Rec. pp. 63, 321), *Carras* v. *Monaghan*, 65 F. Supp. 658, 662 (D.C.W.D. Pa., 1946) and *United Electrical, R. & M. Workers* v. *Westinghouse El. Corp.*, 65 F. Supp. 420, 422 (D.C.E.D. Pa., 1946). See also *Brown* v. *Coumanis*, 135 F. 2d 163, 164 (C.A. 5th, 1943). The third and fourth counts are thoroughly discussed in the brief of *amicus curiae* in this case. We have examined the final draft of said brief and found that we are in agreement with the argument of *amicus*. We therefore wish to be permitted to adopt his brief, especially the argument on the third and fourth counts. In addition, we wish to submit a brief comment on the third count and a statement supplementing, and partly duplicating, the argument of *amicus* on the fourth count, the constitutional issue.

In the third count, appellants submit the same theory of substantive rights which was offered by the appellants in *ILWU* v. *Wirtz*. It was discussed in the appellants' opening brief in that case on pages 74-82 and in the answering brief of Maui Agricultural Company on pages 60-93, although as pointed out in the latter brief, the question was not properly in issue. This theory is but another attempt to apply an Act of Congress dealing with the jurisdiction of federal courts to the territorial courts. The underlying argument is that since Congress has the power to legislate for the Territory, it must have done so. Such an argument entirely disregards the rule of *Inter-Island Co.* v. *Hawaii*, 305 U.S. 306, 312, 59 S. Ct. 202, that

an intention to supersede the local law of the Territory is not to be presumed. Congress was not legislating for the Territory in enacting the Norris-La Guardia Act. *ILWU* v. *Wirtz, supra.*

A. *The Constitutional Issue*

The constitutional issue in this case is whether the order issued by appellee Circuit Judge was in violation of the right of peaceful picketing which is derived from the First Amendment. In order that the issue may be properly considered, it is necessary to determine what is the nature of the right. It is to be noted that so far as the constitutional issue is concerned, the Territory is in the same position as the United States or the states, for the same right obtains against all three. Hence, our territorial status is immaterial in this consideration. Following the discussion on the nature of the right, the order in question will be briefly considered.

1. PICKETING A QUALIFIED RIGHT—THE RULE OF DRIVERS UNION V. MEADOWMOOR CO.

The nature of the right to picket peaceably is, of course, to be determined from the decisions of courts, particularly those of the United States Supreme Court, for the Constitution does not mention such a right. In the brief of *amicus curiae* pages 15 to 22, the pertinent Supreme Court decisions are traced in chronological order and two of the most important cases for the purpose of this case are discussed at length. Even though there will be duplication, appellees desire briefly to review a few of those cases. *Thornhill* v. *Alabama*, 310 U.S. 88, 60 S. Ct. 736, decided in 1940, was the first of the cases sustaining the right to picket on a constitutional basis. Upon an

appeal from a conviction under an Alabama anti-picketing statute, the statute was held invalid because it was too broad, the statute having prohibited all picketing irrespective of the nature of the picketing, peaceful or otherwise. The picketing for which the defendant was prosecuted was of a peaceful nature and no violence was involved. The Court took pains, however, to point out that the right to picket is not an absolute, unqualified right:

> ". . . We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger. Compare *American Foundries* v. *Tri-City Council*, 257 U. S. 184, 205. . . ."
>
> 310 U. S. 88, 105.

Although dictum, its significance lay in the fact that it qualified the right to picket in the very case in which the right was first given effect. And it was not long before the dictum became law, for the next case in the Supreme Court was *Drivers Union* v. *Meadowmoor Co.*, 312 U.S. 287, 61 S. Ct. 552, decided the following year.

Like the *Thornhill* case, the *Drivers Union* case came to the Supreme Court through the state courts. The company filed a suit in equity in Illinois against the union to enjoin picketing of stores where the company's products were sold. A restraining order issued, enjoining all union conduct, peaceful as well as violent, and the case was referred to a master. The master found that considerable violence had occurred and recommended that all picketing be enjoined. The trial court enjoined only the violence and permitted peaceful picketing. Upon appeal, the state supreme

court reversed the trial court and ordered that the injunction prohibit all picketing. Upon appeal to the United States Supreme Court, the action of the state supreme court was affirmed. The Court held that the states have power, by the use of equity powers vested in the courts, to prevent violence, and where picketing has been enmeshed with violence, the courts have power to enjoin all picketing for the purpose of preventing its recurrence. The Court squarely held that the Constitution does not preclude the exercise of injunctive powers against picketing:

> ". . . Nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct. . . .
>
> ". . . A state may withdraw the injunction from labor controversies but no less certainly the Fourteenth Amendment does not make unconstitutional the use of the injunction as a means of restricting violence. We find nothing in the Fourteenth Amendment that prevents a state if it so chooses from placing confidence in a chancellor's decree and compels it to rely exclusively on a policeman's club."
>
> 312 U. S. 287, 294-295

Unlike the *Thornhill* case, which related to the validity of a general statute, this case involved a specific injunction. The dictum of that case was nevertheless held to be equally applicable to an injunction as to a properly drawn statute:

> "We do not qualify the *Thornhill* and *Carlson* decisions. We reaffirm them. They involved statutes baldly forbidding all picketing near an employer's place of business. Entanglement with violence was expressly out of those cases. The statutes

had to be dealt with on their face, and therefore we struck them down. Such an unlimited ban on free communication declared as the law of a state by a state court enjoys no greater protection here. *Cantwell* v. *Connecticut*, 310 U. S. 296; *American Federation of Labor* v. *Swing*, *post*, p. 321. But just as a state through its legislature may deal with specific circumstances menacing the peace by an appropriately drawn act, *Thornhill* v. *Alabama*, *supra*, so the law of a state may be fitted to a concrete situation through the authority given by the state to its courts. This is precisely the kind of situation which the *Thornhill* opinion excluded from its scope. 'We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger . . . as to justify a statute narrowly drawn to cover the precise situation given rise to the danger.' 310 U. S. 105. We would not strike down a statute which authorized the courts of Illinois to prohibit picketing when they should find that violence had given to the picketing a coercive effect whereby it would operate destructively as force and intimidation. Such a situation is presented by this record. It distorts the meaning of things to generalize the terms of an injunction derived from and directed towards violent misconduct as though it were an abstract prohibition of all picketing wholly unrelated to the violence involved."

312 U. S. 287, 297-298.

The *Drivers Union* case established beyond doubt that the right to picket is not an absolute or unqualified right, but that it may not only be regulated but even forfeited under certain circumstances. Subsequent decisions show that the right is subject to other limitations. Thus, where the purpose of the picketing is not legitimate, an injunction restraining peaceful picketing will likewise be upheld. *Carpenters Union* v.

Ritter's Cafe, 315 U. S. 722, 62 S. Ct. 807 (1942). There an injunction was sustained under the following circumstances. Ritter, who was engaged in the restaurant business, was putting up a new building, which was to have no connection with the restaurant. The contractor who was engaged in the work employed non-union men. For the purpose of inducting Ritter to require the contractor to employ union men, the union picketed Ritter's restaurant. Under such circumstances, it was held that the picketing was lawfully enjoined.[1] The Court made the following observation:

> ". . . But the circumstance that a labor dispute is the occasion of exercising freedom of expression does not give that freedom any greater constitutional sanction or render it completely inviolable."
> 315 U.S. 722, 725

Also indicating the qualified nature of the right to picket is *Allen Bradley Local* v. *Board*, 315 U.S. 740, 62 S. Ct. 820, wherein an order of the Wisconsin Employment Relations Board prohibiting mass picketing, threatening of employees desiring to work, obstructing points of ingress and egress and streets and highways, and picketing of employees' homes, was held not to be in conflict with the Norris-La Guardia Act and was sustained as a valid exercise of the state police power.

The *Drivers Union* case is, of course, the leading case on the effect of violence and other unlawful conduct on the right to picket. Following it is a considerable line of federal and state cases, a number of which have been cited in the brief of *amicus* (pp. 23-26). Additional authorities include: *Steiner* v. *Long*

---

[1]However, in another secondary picketing case, the injunction was not upheld. *Bakery Drivers Local* v. *Wohl*, 315 U.S. 769, 62 S. Ct. 816 (1942).

Beach Local, 19 Cal. 2d 676, 123 P. 2d 20 (1942); *People* v. *Saffel*, 74 Cal. App. 2d 967, 168 P. 2d 497 (1946); *Westinghouse Elec. Corp.* v. *United E. R. & M. Workers*, 139 N. J. Eq. 97, 49 A. 2d 896 (1946); *United States El. Motors* v. *United E. R. & M. Workers*, 166 P. 2d 921 (L.A., Cal., Super. Ct., 1946); *Carras* v. *Monaghan*, 65 F. Supp. 658 (D.C. Pa., 1946).

Each of these cases is worthy of note. The *Steiner* case was a suit for an injunction to enjoin picketing and boycotting which had been carried on by the union, attended by some violence and intimidation of plaintiffs' employees and their families. A blanket injunction prohibiting all picketing and boycotting was issued. Although upon appeal the injunction was modified to permit picketing other than at plaintiff's plant and the places where violence had occurred, the California Supreme Court expressly adopted and followed the rule of the *Drivers Union* case as the law of the state. The Court further stated that extreme physical violence was not necessary to bring a case within the rule, abusive language, threats of violence, intimidation and the like being enough. In the *Saffel* case, the rule was applied directly in a criminal case charging contempt of court for violation of an order regulating picketing. It was held that the mere allegation in the complaint that the order in question was "a lawful order" "imports that the order was made on such a state of facts as would render it lawful." (168 P. 2d 497 at 507) The Court was referring to the rule of the *Drivers Union* and *Steiner* cases, which it recognized as the law of the state in overruling a demurrer to the charge.

The New Jersey case of *Westinghouse Elec. Corp.* v. *United E. R. & M. Workers, supra*, was, like the *Steiner*

case, a suit to enjoin picketing. Two restraining orders and a preliminary injunction were issued, which prohibited picketing for the purpose of preventing egress and ingress and massing at gates to plaintiff's plant; required pickets around the plant to be ten feet apart; limited pickets on streets about the plant to twenty-five pickets and pickets at plant entrances to five pickets; and further prohibited violence, coercion, intimidation, assembling at certain points and obstructing of streets and sidewalks. It was contended for the defendants that since there had been no acts of violence, picketing could not be regulated. It was found that there had been no acts of serious violence. The case also involved a question of the effect of the state anti-injunction law. The case squarely involved the question of whether in the absence of violence, picketing can be restrained consistently with the Constitution of the United States and the state anti-injunction law. By a unanimous decision of eleven justices, the order of the Court of Chancery was affirmed on the ground that picketing which is used as a coercive measure is subject to regulation. Speaking of the "workingman's qualified right to picket", the Court held that factors other than violence, such as intimidation, coercion, duress, fraud and force, also operate to bar the right to picket:

> ". . . It is stoutly urged for appellants that since the picketing employed by them was free from acts of violence, the restraints and injunctive relief granted trenched upon their constitutional right of free speech and assembly under the Fourteenth Amendment to our Federal Constitution. Cf. Thornhill v. Alabama, supra; Carlson v. California, 310 U.S. 106, 60 S. Ct. 746, 84 L.Ed. 1104; Cafeteria Employees Union v. Angelos, 320 U.S. 293, 64 S. Ct. 126, 88 L. Ed. 58. The argument is

> not sound. It fails to recognize factors other than violence which operate to bar the workingman's qualified right to picket as a means of communication. Such other factors, for example, are that the picketing must be peaceful; that it must be free from intimidation, coercion, duress, fraud, and force; that it must, under the Anti-Injunction Act of our State, be, among other things, 'not in violation of any other law of this State.' . . ."
>
> 49 A. 2d 896, 904-905.

Both this case and the California case of *United States El. Motors* v. *United E. R. & M. Workers*, *supra*,[1] are valuable not only for the statement of the law but because of the similarity of the orders therein involved to that in the instant case.

Last but not least of those cases, for it is directly in point in the instant case, is *Carras* v. *Monaghan*, *supra*, which has been previously discussed on another point on page 23 of this brief. The case arose out of a suit for injunction brought by the union in federal court to enjoin the sheriff from enforcing an injunction issued by a state court which restricted picketing. Notwithstanding that the plaintiffs charged that the injunction infringed their rights of peaceful picketing and freedom of speech, the motion to dismiss was granted. The Court held that the exercise of injunctive powers in labor disputes does not violate constitutional rights. The court also rejected the contention that federal courts have exclusive jurisdiction in labor disputes, as previously noted on page 49 of this brief.

There are also many cases in which picketing, notwithstanding its peaceful character, has been enjoined because of the unlawful purpose for which it was car-

---

[1]The case is briefly discussed on page 60, post.

ried on. While such cases are illustrative of the qualified nature of the right to picket, they are not analogous to the instant case and will be merely cited without discussion: *Fred Wolferman, Inc.* v. *Root*, 356 Mo. 976, 204 S.W. 2d 733 (1947), *cert. den.* 333 U.S. 837, 68 S. Ct. 608; *R. H. White Co.* v. *Murphy*, 310 Mass. 510, 38 N.E. 2d 685 (1942); *Saveall* v. *Demers*, Mass. , 76 N.E. 2d 12 (1947); *Markham & Callow* v. *International Woodworkers*, 170 Ore. 517, 135 P. 2d 727 (1943); *Swenson* v. *Seattle Central Labor Council*, 27 Wash. 2d 193, 177 P. 2d 873 (1947); *Retail Clerks' Union* v. *Wisconsin Employment Rel. Bd.*, 242 Wis. 21, 6 N.W. 2d 698 (1942).

2. ORDER IN INSTANT CASE

So far as can be determined from the complaint, the constitutional issue in this case is whether an order "denying plaintiffs the free exercise of their right to picket peacefully" is *per se* unconstitutional. (Rec. pp. 18-19) The complaint contains no specification of unconstitutionality. However, in the course of the protracted arguments in the case and without amendment of the complaint, it was revealed that plaintiffs were submitting the general question of the power of courts to regulate peaceful picketing and the more specific objections that the order in question was too broad, and also vague, ambiguous and confusing, and therefore invalid for such reasons, all of which the District Court took under advisement. (Rec. p. 329) The objection that the order was too broad was based on the representation, made in open court and repeated on pages 43-44 of the opening brief, that the membership of the ILWU totalled 100,000 members and that the property covered by the order included 12,472 acres and 20 company towns. The general question of the power of

courts to regulate picketing is not pressed in the opening brief. In fact, appellants state that "it may even be assumed that a Circuit Court of the Territory can, consistent with the Constitution, regulate mass picketing". (Op. Br. p. 44) Also, the contention that the order was void for ambiguity appears abandoned. The remaining objection is that the order unduly restricted peaceful picketing in view of the large number of persons affected and the territory covered by it. Appellants particularly complain of the provision limiting pickets at points of ingress and egress to three pickets.[1] Appellants also claim that "the means of free communication for hundreds of people living in company towns are denied." (Op. Br. p. 45)

If anything is clear from the foregoing cases in which restrictions on picketing were sustained, it is that obstruction and interference with ingress and egress may be prohibited and that picketing at places of ingress and egress may be regulated by prohibiting mass picketing and by limiting the number of pickets. For example, in *Westinghouse Elec. Corp.* v. *United*

---

[1]Appellants construe such limitation as a definition of the term *mass picketing.* (Op Br. p. 44) Their reasoning seems to be as follows: Paragraph 7 of the order prohibits "mass picketing by assembling in compact groups or congregating in crowds on or near real property of the Petitioner . . . to thereby prevent or attempt to prevent or in any manner physically obstruct or interfere with ingress to or egress from said real property . . ." (Rec. p. 45); the succeeding paragraph limits "the number of pickets . . . to not more than three (3) pickets in a group at any point or station when stationed at points of ingress to and egress from the Petitioner's property . . ." (Rec. p. 46); therefore, mass picketing is any group in excess of three at any point of ingress and egress.

E. R. & M. Workers, supra, discussed on page 55 of this brief, the order prohibited massing at gates and limited pickets at entrances to the plant to five. In the *United States Electrical Motors* case, cited on page 55, the temporary restraining order prohibited mass picketing and limited the number of pickets at entrances to four pickets. The latter provision was vacated when it was shown to be unnecessary, but was restored in the preliminary injunction in modified form, the number being increased to ten. Other precedents are cited on page 27 of the brief of *amicus curiae.* While the specific provisions vary from case to case, as the circumstances require, the purpose of the regulations remains the same, namely, the prevention of breaches of the peace, the maintenance of law and order and the protection of the rights of others. It is obvious that inasmuch as the reasonableness of any limitation is relative to the circumstances of the particular case, it is a question which the court issuing the order is in the best position to determine. *Drivers Union* v. *Meadowmoor Co.*, 312 U.S. 287, 294, 61 S. Ct. 552.

The further complaint that the order denied the employees living in company towns the means of free communication is not justified by the order, nor by the facts. That and other objections as to the scope of the order are discussed in the brief of *amicus* at pages 30 to 32 and will not be treated in this brief.

One other matter that may be commented upon under the constitutional issue is the following statement on page 45 of the opening brief: "The restraint on free speech and assembly contained in the *ex parte* temporary restraining order and the indictment must be judged on their face . . ." That statement may be compared with the holding in *People* v. *Saffel, supra,*

discussed on page 55 of this brief, that in the criminal case in which contempt for violation of an order of court is charged, an allegation that the order was *a lawful order* will "import that it was issued under such a state of facts as would render it lawful". The *Saffel* case is supported by *Maggio* v. *Zeitz*, 333 U.S. 56, 68 S. Ct. 401, where it was held that the validity of a bankruptcy order cannot be retried in the contempt proceeding and wherein it is stated:

> ". . . It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience. Every precaution should be taken that orders issue, in turnover as in other proceedings, only after legal grounds are shown and only when it appears that obedience is within the power of the party being coerced by the order. But when it has become final, disobedience cannot be justified by re-trying the issues as to whether the order should have issued in the first place. *United States* v. *United Mine Workers*, 330 U.S. 258; *Oriel* v. *Russell*, 278 U.S. 358. . . ."
>
> 333 U.S. 56, 69

Appellees respectfully submit, appellants' constitutional objections to the order in question are without substance, for the showing made in the *ex parte* hearing before appellee Circuit Judge, referred to on page 3 of this brief, clearly brought the case within the rule of the *Drivers Union* case.

B. Effect of United Mine Workers case

The final and foremost of appellees' several contentions against the complaint is that in the light of the alternative ground of decision of the *United Mine Workers* case, the merits of the several counts are entirely immaterial in determining whether plaintiffs are entitled to relief. This suit was brought to enjoin the prosecution of a criminal contempt proceeding which was brought to punish the wilful violation of an order of court. In such a case, the *United Mine Workers* case holds, the violation is punishable as a criminal contempt even though the court exceeded its jurisdiction in issuing the order and, *a fortiori*, regardless of the constitutionality of the order. More fully stated, the contention is:

> The complaint fails to state a cause of action in that, as appears on the face of the complaint, the amended temporary restraining order issued in that certain equity action numbered 120, appended to the complaint, was issued by the Honorable Philip L. Rice, Judge of the Circuit Court of the Fifth Circuit, Territory of Hawaii, in the exercise of his powers as a circuit judge at chambers of the Territory of Hawaii.
>
> That a circuit judge at Chambers of the Territory of Hawaii, pursuant to the Hawaiian Organic Act and the laws of the Territory of Hawaii, is a court of general jurisdiction with full equity powers and that its orders must be obeyed by persons subject to the jurisdiction of said court, until and unless set aside or reversed; that this is true whether or not the action of the court in issuing said amended temporary restraining order was erroneous; that the said Circuit Court has jurisdiction to determine its own jurisdiction, and that violations of its amended temporary restraining order constitute criminal contempt irrespective of

> the ultimate disposition of the questions relating thereto raised herein by the plaintiffs' first and second causes of action, based on the Norris-La Guardia and Clayton Acts; that the said Circuit Court has jurisdiction to determine questions of constitutional law, with power to issue an ex parte order for the purpose of preserving rights alleged to be unlawfully invaded to the irreparable injury of the petitioners in the territorial court, pending the return on the order to show cause why an injunction should not issue; and that violations of the amended temporary restraining order issued by defendant constitute criminal contempt irrespective of the ultimate disposition of the questions raised herein by plaintiffs' third and fourth causes of action, based on the Norris-La Guardia and Clayton Acts and the Constitution of the United States.
>
> Rec. pp. 79-80[1]

The *United Mine Workers* case, it will be recalled, was a suit brought in the District Court for the District of Columbia by the United States during the period of government operation of the soft coal mines for an adjudication to the effect that the defendent union and defendant John L. Lewis did not have power to terminate the agreement between the United States and the defendants. At the request of the government, a temporary restraining order was issued *ex parte*, in effect restraining the threatened strike. The strike having taken place, contempt proceedings were brought by the government. The defense to the contempt charge was that the court was without jurisdiction to issue the restraining order because of the limitations of the Norris-La Guardia Act and without jurisdiction to enforce such order. The contention

---

[1]This is from appellees' answer.

was rejected by the court and upon trial defendants were found guilty of contempt, both criminal and civil. The case was appealed to the United States Supreme Court, which affirmed the judgment except to modify the fine imposed on the defendant union. A majority of the Court held that the Norris-La Guardia Act did not prohibit the granting of an injunction at the instance of the government. A different majority of the Court further held, as an alternative ground of decision, that even if the court exceeded its jurisdiction in issuing the order, nevertheless the violation of such an order pending the determination of the court's jurisdiction constituted criminal contempt and was punishable as such.

The opinion of the Court also referred to the case of *Howat* v. *Kansas*, 258 U. S. 181, 42 S. Ct. 277, where it was held that an injunction issued by a court having jurisdiction of the subject matter and the parties must be obeyed without regard for the constitutionality of the statute under which the order is issued. The *Howat* case arose in connection with the Kansas Industrial Relations Act, enacted 1920, which created an administrative tribunal to arbitrate controversies in certain essential industries and in effect provided for compulsory arbitration of labor disputes in such industries. In one case Howat and others were found guilty of contempt for violating a court order which was issued to compel them to testify before the administrative body and, in the other, Howat and members of the United Mine Workers were found guilty of violating an injunction issued at the instance of the attorney general to prohibit a threatened strike, which was alleged to be in violation of the Industrial Relations Act. In both cases the validity of the act was attacked by the de-

fendants. The state supreme court, upon appeal, held that regardless of the constitutionality of the law, the defendants were bound to obey the orders. While the writs of error to the United States Supreme Court in these cases were dismissed on the ground that no constitutional issue was involved, it is apparent that the Supreme Court approved the principle relied on by the state court.

The parallel between these cases and the instant case is too striking to warrant comment. Appellees submit that in view of the rule of these cases, there was no basis or occasion for intervention by the federal court. The same basic considerations, so well expressed in the opinion of Mr. Justice Frankfurter, require that the pending criminal contempt proceedings be prosecuted.

> ". . . A majority of my brethren find that neither the Norris-La Guardia Act nor the War Labor Disputes Act limited the power of the district court to issue the orders under review. I have come to the contrary view. But to suggest that the right to determine so complicated and novel an issue could not be brought within the cognizance of the district court, and eventually of this Court, is to deny the place of the judiciary in our scheme of government. And if the district court had power to decide whether this case was properly before it, it could make appropriate orders so as to afford the necessary time for fair consideration and decision while existing conditions were preserved. To say that the authority of the court may be flouted during the time necessary to decide is to reject the requirements of the judicial process.
>
> "It does not mitigate such defiance of law to urge that hard-won liberties of collective action by workers were at stake. The most prized liberties themselves presuppose an independent judiciary through which these liberties may be, as they often

have been, vindicated. When in a real controversy, such as is now here, an appeal is made to law, the issue must be left to the judgment of courts and not the personal judgment of one of the parties. This principle is a postulate of our democracy.

* * *

"In our country law is not a body of technicalities in the keeping of specialists or in the service of any special interest. There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process. For legal process is subject to democratic control by defined, orderly ways which themselves are part of law. In a democracy, power implies responsibility. The greater the power that defies law the less tolerant can this Court be of defiance. As the Nation's ultimate judicial tribunal, this Court, beyond any other organ of society, is the trustee of law and charged with the duty of securing obedience to it."

330 U. S. 258, 310-312

III. Procedure

There remain for consideration the procedural questions raised by appellants' objections to the action of the District Court in denying their motion to strike and in sustaining appellees' motion for determination of defenses before trial and to dismiss the action. [Rec. p. 379, par. (d)-(g)] The motion to strike was directed to one of the defenses in appellees' answers,[1] summarizing the proceedings in the equity suit in the Circuit Court of the Fifth Circuit and incorporating as part thereof two exhibits, one of which was a certified copy

[1]Although separate answers were filed, one merely adopted the other. (Rec. pp. 69-304, 305)

of the records and files of said equity proceeding and the other a certified copy of the transcript of the *ex parte* hearing upon which the order in question in the instant case was issued. (Rec. pp. 75-78, 81-245, 246-304) The motion to strike was based on the ground that such matters were "redundant, immaterial and impertinent". (Rec. pp. 309-310) The motion was denied by the Court without argument. (Rec. pp. 321, 343-344) The other motion in question was a motion filed by the appellees under Rule 12(d) of the Federal Rules of Civil Procedure, which provides that defenses enumerated in Rule 12(b) shall be heard and determined before trial unless ordered otherwise by the court. Appellees' answers included six defenses in law, five of which alleged a failure of the complaint to state a claim upon which relief could be granted, which is one of the defenses enumerated in Rule 12(b). (Rec. pp. 78-80) In addition to the determination of such defenses before trial, the motion asked for dismissal of the action. (Rec. pp. 306-308) During the hearings on said motion, which extended from August 26, 1947 to September 8, 1947, appellees filed another motion, under Rules 12 and 56, requesting that in ruling upon appellees' motion to dismiss, the Court take into consideration the entire record made by the pleadings, including the exhibits attached to the complaint and answers. (Rec. p. 312) In ruling on appellees' motions, the Court treated them as a motion for summary judgment and ordered the action dismissed. (Rec. pp. 320-321, 339, 343-344)

Appellants' argument on the motion to strike is that the proceedings in the equity suit are immaterial and irrelevant in determining the validity of the order in question and of the contempt charge predicated thereon because they must be judged on their face, appellants

contending, of course, that the order and charge are both void on their face. (Op. Br. pp. 16-18) But it has been previously shown in this brief (pp. 55, 61) that, on the contrary, in collateral proceedings involving an order of court, it will be assumed that the order was issued under such a state of facts as would render it valid. Perhaps it was "redundant, immaterial and impertinent" for the appellees to show that in this case such an assumption is in accord with the facts. Yet it could hardly be complained of as prejudicial error to the appellants if the appellees succeeded in their showing. It is submitted that the motion to strike was without merit, as well as untimely, as pointed out on page 6 of this brief.

Appellents' complaint of the disposition of the cause on appellees' motions is also not well taken. While the amendments to Rule 12, providing for the treatment of motions to dismiss for failure of the complaint to state a good claim under Rule 12(b) and motions for judgment on the pleadings under Rule 12(c) as motions for summary judgment, did not take effect until after the decision by the District Court, nevertheless the action of the Court was in line with the practice recognized in several of the circuits, particularly the Second Circuit, prior to the adoption of the amendments. Two cases showing the practice are cited in the Court's opinion (Rec. p. 320) and others are cited in the comment on the amendment in the Report of the Advisory Committee on Rules for Civil Procedure (June 14, 1946). A direct precedent for this case may be found in *Wawa Dairy Farms* v. *Wickard*, 56 F. Supp. 67 (D.C.E.D. Pa., 1944), *aff'd* 149 F. 2d 860 (C.A. 3rd, 1945), where in an action to review an order issued by the Secretary of Agriculture, a motion for summary judgment was granted on the basis of the

certified copy of the proceedings before the Secretary, which was incorporated as part of the answer. See also *Fields* v. *Hannegan*, 162 F. 2d 17 (C.A.D.C., 1947), *cert. den.* 332 U. S. 773, 68 S. Ct. 88.

The Court ruled that "if need be, the court may consider the exhibits attached to and made part of the pleadings of both parties." (Rec. p. 320) However, the Court first considered appellants' contention that the order in question was void on its face and ruled without resort to the exhibits that the order was not void. (Rec. pp. 333-338) The Court then proceeded to consider the record and transcript of evidence in the original equity suit and found that such proof was "a further reason for holding [the] Order valid." (Rec. p. 338) The Court thereupon concluded (Rec. p. 339):

> "So it is that upon the facts alleged—facts incidentally which do not support plaintiffs' argument that a conspiracy to deny plaintiffs their rights and to single them out for prosecution in order to intimidate others has been alleged in the complaint, and also as these facts are amplified by defendants' speaking motion—I find in point of law that plaintiffs' constitutional rights have not been invaded by the Amended Restraining Order.
>
> "There being no genuine issues of fact remaining to be tried, summary judgment for the defendants may be entered."

In short, the Court first found that the complaint itself failed to state a claim for relief and further found from the entire record that there was no genuine issue as to any material fact and that on the undisputable facts as shown by the exhibits to the answer, appellees were entitled to judgment *as a matter of law.*

Plaintiffs complain that they were not offered an opportunity to controvert the exhibits attached to the

answers. Yet they did not at any time submit any affidavits controverting the record of the equity suit, if indeed they could impeach the record. On pages 20 to 21 of the opening brief, appellants list the facts they could have proved, all of which were repeatedly represented to the Court during the course of the extended oral arguments. The facts offered by the appellants were either immaterial or as a matter of fact taken into consideration by the Court anyway. The fact that only three of the appellants were employees of the Lihue Plantation Company, the petitioner in the original equity suit, and that the evidence in the equity suit did not connect any of the appellants with the events leading to the issuance of the order was immaterial, for the allegations of the complaint itself show that plaintiffs were all members of the ILWU (Rec. p. 6), which was enjoined by the order, and the allegations of the indictment, which was attached as an exhibit to the complaint, show that appellants all had knowledge and notice of the order. (Rec. pp. 35-36, 39) As a matter of law, appellants were therefore bound by the order. *People* v. *Saffel, supra;* 28 Am. Jur. 505; 43 C.J.S. 1009. As to their charges of denial of equal protection, the Court expressly found that the charges were not supported by the facts, assuming such charges to have been made in the complaint. (Rec. p. 339) "Suspicions are not sufficient to raise a genuine issue of fact." *Banco de Espana* v. *Federal Reserve Bank*, 28 F. Supp. 958, 973 (D.C.S.D.N.Y., 1939), *aff'd* 114 F. 2d 438 (C.A. 2d, 1940). As to the size and scope of the territory covered by the order, its application to company towns and the limitations of the order itself, the Court was fully aware of appellants' contentions and expressly took them into consideration. (Rec. pp. 329-339) Finally, as to the disqualification of appellee Circuit

Judge, any such contention would be in the face of the Hawaiian cases. *Ewa Plantation Co.* v. *Tax Assessor*, 18 Haw. 509; *Bruner* v. *Brewer*, 20 Haw. 617. The following language from *Sabin* v. *Home Owners' Loan Corp.*, 151 F. 2d 541, 542 (C.A. 10th, 1945), *cert. den.* 328 U. S. 840, 66 S. Ct. 1011, is most appropriate:

> "The charge that the trial judge was disqualified . . . is too gauzy to present a substantial question. The motion for summary judgment was properly sustained."

Appellants received every consideration from the Court. Not only were they given what seemed to appellees unlimited time to present their many contentions and theories, but also permitted much liberty in the course of argument in injecting and adverting to matters not disclosed by their pleading. It is submitted that the procedural aspects of the case are free of prejudicial error.

CONCLUSION

In conclusion, appellees contend that the District Court was without jurisdiction to grant relief in this cause for the following reasons:

First, the provisions of 28 U.S.C. sec. 379 (28 U.S.C. sec. 2283, effective September 1, 1948) preclude the granting of an injunction to stay a proceeding pending in the circuit courts of the Territory.

Second, the complaint failed to establish a cause of action for equitable relief.

Third, no court of equity can enjoin another court or the judge thereof, nor can an action be maintained against an officer of the Territory when in substance it is a suit against the Territory.

Moreover, in the light of the *United Mine Workers* case, there was no occasion for the Court to consider the merits of the several counts.

But assuming *arguendo* that the merits of the cause were properly in issue, appellees submit that the ruling on the merits was correct and further that there was no prejudicial error in the procedural aspects of the case.

Accordingly, appellees respectfully submit that the judgment for appellees should be affirmed.

Dated at Honolulu, T. H., this 12th day of October, 1948.

Respectfully sumitted,

WALTER D. ACKERMAN, JR., Attorney General, Territory of Hawaii and MICHIRO WATANABE, Deputy Attorney General, Attorneys for Appellees,

By

Michiro Watanabe

APPENDIX

. . . the district courts shall have jurisdiction as follows: . . .

Twelfth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, ordinance, regulation, custom, or usage of any State, of any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law of the United States to persons within the jurisdiction thereof.

Rev. Stat. sec. 563

. . . That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently, with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this

act or the act establishing a Bureau for the relief of Freedom and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the States wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.

Sec. 3 of Act of April 9, 1866; 14 Stat. 27

. . . That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections six-

teen and seventeen hereof shall be enforced according to the provisions of said act.

Sec. 18 of Act of May 31, 1870; 16 Stat. 144

. . . That any person who, under color of any law, statutes, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.

Sec. 1 of Act of April 20, 1871; 17 Stat. 13

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Rev. Stat. sec. 1979

§642. Jurisdiction of district court; authority of officers.

The said court shall have the jurisdiction of district courts of the United States, and shall proceed therein in the same manner as a district court; and the said judges, district attorney, and marshal shall have and exercise in the Territory of Hawaii all the powers conferred by the laws of the United States upon the judges, district attorneys, and marshals of district courts of the United States. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838, Mar. 3, 1911, ch. 231, § 291, 36 Stat. 1167; July 9, 1921, ch. 42, § 313, 42 Stat. 119.)

48 U.S.C. sec. 642[1]

§ 645. Appeals.

Appeals from the said district court shall be had and allowed to the circuit court of appeals for the ninth judicial circuit in the same manner as appeals are allowed from district courts to circuit courts of appeal as provided by law, and the laws of the United States relating to juries and jury trials shall be applicable to said district court. The laws of the United States relating to appeals, removal of causes, and other matters and proceedings as between the courts of the United

[1]See page 77.

States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii. (Apr. 30, 1900, ch. 339, § 86, 31 Stat. 158; Mar. 3, 1909, ch. 269, § 1, 35 Stat. 838; July 9, 1921, ch. 42, § 313, 42 Stat. 119; Feb. 13, 1925, ch. 229, § 1, 43 Stat. 936; Jan. 31, 1928, ch. 14, § 1, 45 Stat. 54.)

48 U.S.C. sec. 645[2]

[1, 2]Sec. 8 Section 86 of the Act approved April 30, 1900 (chapter 339, 31 Stat. 158; 48 U.S.C., secs. 641, 642, 643-645), as amended, is amended to read as follows:

"Sec. 86. The laws of the United States relating to removal of causes, appeals and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

Sec. 8 of Act approved June 25, 1948 (Ch. 646, P. L. 773, 80th Cong., 2d Sess.)

§ 52. (Criminal Code, section 20.) Depriving citizens of civil rights under color of State laws.

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subject, or causes to be subjected, any inhabitant of any State, Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution

and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000, or imprisoned not more than one year, or both. (Mar. 4, 1909, ch. 321, §20, 35 Stat. 1092.)

18 U.S.C. sec. 52
(18 U.S.C. sec. 242, effective September 1, 1948)